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

EIGHTY-FIFTH SESSION

***In re* Adorf**

Judgment 1738

The Administrative Tribunal,

Considering the complaint filed by Mr. Hans-Martin Adorf against the European Southern Observatory (ESO) on 12 February 1997 and corrected on 22 May, the ESO's reply of 21 August, the complainant's rejoinder of 27 November 1997 and the Observatory's surrejoinder of 27 January 1998;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a German who was born in 1954, joined the staff of the Observatory on 1 February 1985 as a "fellow" under a fixed-term appointment for one year. Fellows are treated as "non-established" employees. The complainant was put on a post for a scientific systems analyst and programmer. The ESO renewed his contract several times, and for the last time on 27 October 1989. On 18 December 1990 it offered him a contract as an "auxiliary" for three years as from 1 February 1991. Auxiliaries too are non-established staff.

By a memorandum of 8 April 1993 the head of Administration told the international staff that the Council of the ESO had decided to do away with the category of auxiliaries and to create thirty posts for established international staff members; any auxiliary put on one of those posts would get a contract for three years and periods of service as auxiliary would count towards qualification for a permanent appointment. On 6 May the head of Administration told the complainant that the Observatory had decided to grant him a three-year appointment as from 1 May as a member of its established staff.

By a letter of 27 October 1995 the head of Personnel told him on the Director General's behalf that his appointment was extended, by one year only, to 30 April 1997. By a letter of 30 October 1996 the head of Personnel informed him, again on the Director General's behalf, that his contract would not be renewed. He gave two reasons. One was that only a few new permanent appointments might be granted, and only on vacant posts that deserved priority; the other was that the complainant's performance reports suggested that he had "outgrown" his job. On 18 December he appealed to the Director General. By a letter of 27 December 1996, which is the impugned decision, the head of Administration told him on the Director General's behalf that according to Article VI 1.02 of the Staff Rules no internal appeal lay against non-renewal.

Meanwhile his old post had been put up for competition. He applied on 30 January 1997. By a letter of 11 March a personnel officer told him that, on the same grounds as for the non-renewal, the ESO would not be considering his application.

B. The complainant contends that the decision of 27 December 1996 was in breach of Article R II 1.16 of the Staff Regulations as in force at 1 April 1993. That article reads:

"Staff members shall receive on appointment a fixed-term contract of not more than 3 years' duration. This contract may be renewed or extended once or more often to cover a maximum total period of not more than 9 years. After this period of 9 years, the Director General will grant an indefinite contract, or the contract will be terminated."

He points out that he served the Observatory for over a dozen years and his post was never abolished. In accordance with R II 1.16 the Observatory must therefore treat him as a *de facto* holder of a permanent appointment. On granting his various contracts it drew a distinction between the categories of staff he belonged to.

The distinction was contrived. Its purpose was to deprive him of a career. Since his duties were the same all the time he was with it, it should have treated him from the outset as a member of the established staff or at least as an auxiliary. The Tribunal has in several cases ruled that an international organisation may not make systematic use of fixed-term contracts for the performance of continuing administrative duties.

The complainant also cites Article R II 1.21 of the Regulations as in force at the material time. That provision says that a fellow's first contract, which must be for one year, may be renewed for a second one and only exceptionally for a third. The Observatory ought accordingly to have let him have a contract as an auxiliary or established staff member from 1 February 1988 and made a mistake of law by deciding on 20 October 1989 to renew his contract as a fellow for one year.

He submits that in any event it acted unlawfully in ending his appointment.

First, the reasons it gave for not renewing his contract are inconsistent. His post has not been abolished: it was put up for competition. So the defendant may not properly plead the low priority it gave to the post or the need to reduce staff. The fact that the complainant is over-qualified for the post is not a valid reason either for its dismissing him. In his submission the true reason for the non-renewal was its policy of not granting permanent appointments.

Secondly, he observes that it disappointed his rightful expectations to renewal or to conversion of his appointment into a permanent one. An organisation is estopped from disappointing expectations it gives its staff by its behaviour.

Thirdly, the Observatory ought to have tried to reassign him, as Article R II 6.11 of the Regulations required it to do. The reply from Personnel Services to the application he put in for his old post shows that he was rejected without even being considered by the Selection Board.

Lastly, the ESO was guilty of abuse of authority since replacing him with someone new, perforce less experienced, was against its own interests.

He seeks the quashing of the decision of 27 December 1996 and an award of costs.

C. In its reply the ESO submits that the complaint is irreceivable. The complainant was informed on 31 October 1996 of the decision not to renew his appointment, and so that was the start of the time limit of ninety days in Article VII(1) of the Tribunal's Statute. Since he did not file his complaint until 12 February 1997 it was out of time.

The ESO's arguments on the merits are subsidiary. It submits that the complainant is no longer entitled to challenge the lawfulness of the earlier renewals of his appointment. He did not challenge the decision of 27 October 1995 offering him a one-year extension. Although the renewals of his contract as a fellow are "contrasted" to the wording of the Staff Regulations, staff retrenchment at the time required the grant of such contracts even for long-term employment. In any event he consented to the extensions of his contract as a fellow. Citing Judgment 1634 (*in re* Gawlitta), the ESO argues that he is not in the same position as was the complainant in that case, whose argument the Tribunal allowed in part.

The Observatory contends that his supervisor was right to come to the view that, having improved his qualifications, he was no longer suitable for his post. It is not in an international organisation's interests to keep on indefinitely someone who is over qualified for his duties. It would likewise have been pointless to consider him for his old post.

D. In his rejoinder the complainant cites Judgment 1082 (*in re* Liégeois) in support of his contention that his complaint is receivable. That judgment accepted that, when staff regulations precluded internal appeal, the time limit for coming to the Tribunal should start at the date of the confirmation of the original decision after the hearing of objections from the staff member. He was entitled to assume that the Administration, having got his claims, would rule on the lawfulness of the decision he was challenging. In any event he sees a procedural trap in its failure to tell him in the decision of 27 December 1996 that he could go straight to the Tribunal.

On the merits he cites Judgment 1634 and observes that the ESO's choice of staff category was just a ruse to deny him the safeguards of the rules. He has applied for five vacancies with the Observatory but has had replies - all

unfavourable - to only some of his applications.

E. In its surrejoinder the ESO contends that Judgment 1082 is irrelevant because the defendant in that case had taken a stand on the complainant's claims. There is no reason to suppose that the present complainant has fallen into any procedural trap.

The ESO adds that the five vacancies for which he applied were filled by candidates who were better qualified.

CONSIDERATIONS

1. The complainant joined the staff of the European Southern Observatory on 1 February 1985 under a fixed-term appointment. He held a post for a scientific systems analyst and programmer and was described as a "fellow". After several extensions he got a contract as an "auxiliary" from 1 February 1991, and on 14 May 1993 he signed a fixed-term contract for three years as from 1 May 1993. On 27 October 1995 the ESO offered to extend his appointment, by one year, to 30 April 1997 and told him in a letter of 30 October 1996 that it would grant no further extension beyond that date. By a letter of 18 December 1996 he appealed to the Director General against the decision of 30 October to end his appointment on 30 April 1997.

2. By a letter of 27 December 1996 the head of Administration told him that under Article VI 1.02 of the Staff Rules no internal appeal lay against non-renewal.

3. On 12 February 1997 he lodged this complaint asking the Tribunal to set aside what he regards as the final decision within the meaning of Article VII(1) of the Statute, the letter of 27 December 1996.

4. The Observatory says that his complaint is irreceivable because he filed it after expiry of the ninety-day time limit in Article VII(2) of the Statute. In its submission, since Article VI 1.02 of the Staff Rules bars internal appeal against non-renewal, the decision of 30 October 1996, which he acknowledges having got the next day, is the final one; so the ninety days started on 31 October 1996. The Observatory sees the complainant as mistaken in contending that the head of Administration took a decision on 27 December 1996: the letter of that date was merely a reminder of what the rules said, though he was supposed to understand them anyway and should have realised that the final decision was the one of 30 October 1996.

5. The complainant's answer is that

"... he submitted his internal appeal against the decision of 30 October 1996 within the 60-day time limit set in the ESO's rules and so of course within the 90-day one in Article VII(2) of the Tribunal's Statute. So he still had 90 days in which to lodge his complaint from the day at which he got notice of the final decision. In his appeal of 18 December 1996 he asked the ESO to review its original decision, and he had every reason to expect it to feel bound to take a stand on the lawfulness of that decision."

In support he cites Judgment 1082 (*in re* Liégeois) of 29 January 1991.

6. He has a second plea. He submits that "even on the Observatory's own hypothesis ... its argument must fail because in any event it has not actually let him exercise his right of appeal". In its decision of 27 December 1996 it merely observed that appeal did not lie against the decision of 30 October 1996; though the time limit for a complaint to the Tribunal against that decision had yet to expire, it failed to tell him he could still file one; so it set a procedural trap to deprive him of the right to appeal against the non-renewal.

7. Judgment 1082 does not help him. As the Observatory points out, that case may be distinguished on the facts. There the defendant had taken a stand in internal proceedings on an irreceivable appeal; here the letter of 27 December 1996 merely referred the complainant to Article VI 1.02 of the Rules.

8. Though that letter would have done well to warn him that he could go to the Tribunal, the omission did not relieve him of the duty of compliance with the time limit in VII(2).

9. The conclusion is that the challengeable decision was the one of 30 October 1996 notified the next day, and that the ninety days for lodging a complaint with the Tribunal ran out on 29 January 1997. Since he did not file until 12 February 1997, his complaint missed the time limit in Article VII and is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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