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

EIGHTY-FIFTH SESSION

In re de Roos

Judgment 1745

The Administrative Tribunal,

Considering the complaint filed by Mr. Rinze de Roos against the European Southern Observatory (ESO) on 18 December 1996 and corrected on 24 March 1997, the ESO's reply of 27 June, the complainant's rejoinder of 14 October 1997 and the Observatory's surrejoinder of 14 January 1998;

Considering Articles II, paragraph 5, and VIII 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 Dutchman who was born in 1949, joined the staff of the ESO on 1 September 1986. He held a fixed-term appointment for three years and was stationed at the Observatory's headquarters at Garching, near Munich. He was a computer operator. After a renewal of his appointment for three years the ESO gave him an indefinite one on 1 September 1992. At the material time he was in the Data Management Division.

The ESO informed its Finance Committee on 21 March 1995, at its 82nd Session, that it would be seeking tenders for the "outsourcing" of the Division's work in "information technology". At its 86th Session (6 and 7 November 1995) the Committee was told of proposals to award a contract for that purpose.

By a letter of 6 December 1995 the head of Personnel informed the complainant that outsourcing meant doing away with several posts in the Division, one of which was his. Since the ESO was unable to offer him another post, his appointment would be terminated under Article R II 6.01(h) of the Staff Regulations after the period of ten months' notice required by Article R II 6.13.

The ESO signed on 27 December 1995 the contract for outsourcing with a private firm.

In a memorandum of 30 January 1996 the complainant lodged an appeal with the Director General against the decision of 6 December 1995. He said that it was unlawful: contrary to what the ESO was making out the decision was not in its interests, and it had failed in its duty to find him another post. By a letter of 13 March 1996 the chairman of the Joint Advisory Appeals Board informed him that the Director General had referred his case to the Board. In its report of 24 July the Board concluded that the abolition of his post was due not to outsourcing but to a "ceiling" that the ESO Council had set on the number of international staff. Though it was in favour of having the Tribunal rule on the lawfulness of outsourcing, it recommended reinstating the complainant on the grounds that some of his pleas were sound. The Director General sent him the report under cover of a letter of 19 September 1996 upholding the decision of 6 December 1995. That is the decision he is impugning.

B. The complainant has six pleas.

The first is that the Observatory acted in breach of Article R VII 1.02 of the Staff Regulations, which says:

"The Director General shall consult the [Standing Advisory] Committee and receive its recommendations on general questions concerning the personnel including the contents and application of the Combined Staff Rules and the present Regulations."

Although "outsourcing" and the consequent abolition of posts were obviously "general questions concerning the personnel", the ESO never consulted its Advisory Committee.

Secondly, it broke an oral promise made to him by the acting head of the Data Management Division on 29 March 1995 that outsourcing would not mean abolishing any posts.

Thirdly, it failed to tell him the real reason for abolishing his post. It made out that it would be saving money by the outsourcing, but it has not. The real reason for abolishing posts was that it wanted to hold the number of staff at a certain figure.

His fourth plea is that it failed to find him another post on its own staff, although it could have done and indeed was required to do so by Article R II 6.11 of the Regulations.

Fifthly, since outsourcing was obviously not in its interests, it abused its authority by abolishing his post.

Lastly, it caused him unnecessary and undue injury because it need not have abolished his post.

He asks the Tribunal to quash the Director General's decision of 19 September 1996 and to award him costs.

C. In its reply the Observatory argues that in deciding to subcontract some work on information technology, that was not among its main tasks, the Director General was exercising the authority vested in him by Article VI of its founding Convention. It has already contracted out several services, particularly at its headquarters at Garching. Consistent precedent has it that an international organisation may carry out internal reforms at its own discretion. Likewise, determining whether outsourcing will save money is a management decision that it is up to the Director General to take.

Outsourcing is not a "general question concerning staff" within the meaning of Article R VII 1.02 but a matter of "operation policy". It was not originally intended to reduce staff. In any event the Director General was not bound to consult the Standing Advisory Committee about the decision to abolish the complainant's post. Consulting the Committee is an "imperfect obligation" since the rules prescribe no penalty for failure to discharge it. So such failure does not make any subsequent decision null and void. Besides, the Director General did consult the Committee on some features of outsourcing. The oral statement by the acting head of the Division was a general one and was not binding on the Observatory, the less so since it was about the situation then prevailing. The complainant is wrong in saying he was not told of the real reasons for abolishing his post: he mistakenly assumes that the main purpose of outsourcing was to save money. In fact there were more potent reasons of which he was well aware: the ESO needed the services of a firm expert in a fast-developing field of technology and it had to keep the number of staff from rising. The Department of Personnel did try, as the Director General asked, to find him another post, but to no avail.

D. In his rejoinder the complainant points out the ESO's omission to challenge his contention that subcontracting saved no money, although in the internal proceedings it kept citing financial reasons both for that policy and for the abolition of his post. So outsourcing was just a way of keeping to the "ceiling" set by the Council on the number of staff.

E. In its surrejoinder the Organisation presses its main arguments.

CONSIDERATIONS

1. The ESO recruited the complainant in September 1986 as an "operation technician (computers)". In 1995 it decided to get an outside contractor to take over some of its work in information technology - "outsourcing" is its term - and it therefore set about reforming its Data Management Division. It thus came to abolish three posts, including the complainant's, in the Computer Management and Operation Group of the Division. By a letter of 6 December 1995 the head of Personnel told him that his post was to go; his last working day would be 31 December 1995; he would get ten months' notice, up to 5 October 1996, and in that period would be on special paid leave; the Observatory had failed to find him a suitable post but he might apply for a new job as "archive system design and engineer" which it would shortly be announcing. He appealed against the decision of 6 December 1995 and the case went to the Joint Advisory Appeals Board.

2. The Board spent several sittings hearing his case and a similar one. Its report was highly critical of the ESO. It held that the abolition of posts that outsourcing had brought about was "a general question concerning the personnel" and warranted prior consultation of the Standing Advisory Committee in accordance with Article R VII 1.02 of the Staff Regulations. It did not accept the argument that outsourcing saved money. Nor, in its view, had

the Observatory done enough before letting him go to give him the training he had asked for or find him another post. It therefore recommended reinstating him. By a decision of 19 September 1996, however, the Director General upheld the earlier one, though he "reiterated" the ESO's offer to help the complainant to find a suitable new job.

3. That is the decision he is impugning and his complaint is receivable. He has six pleas: the loss of posts which was the mischief of "outsourcing" required prior consultation of the Standing Advisory Committee; dismissal was in breach of promises made to the staff; the ESO failed to reveal the true reason for abolition; it was remiss in looking for another post for him; it committed an abuse of authority; and it caused him unnecessary, undue and therefore actionable moral injury.

4. He is mistaken in pleading a procedural flaw in the decisions to subcontract work and discard posts. Article R VII 1.02 of the Staff Regulations, which he cites, says that:

"The Director General shall consult the [Standing Advisory] Committee and receive its recommendations on general questions concerning the personnel including the contents and application of the Combined Staff Rules and the present Regulations."

But he misreads that article. The mere fact that a decision on organisation or management may affect the staff is not enough to make consultation compulsory. A policy of staff retrenchment does amount to a "general question concerning the personnel". But what the ESO did was to subcontract work to a firm of specialists in information technology the better to keep pace with change in that field. Such a decision does not in itself come within the ambit of R VII 1.02, even if it does affect the redeployment of posts or even the chances of survival of some of them. And the abolition of the complainant's post and two others is not a "general question" calling for referral to the Committee.

5. The complainant's plea of breach of promise fails too. In support of his contention that the ESO broke its word he says that the acting head of the Data Management Division promised staff on 29 March 1995 that outsourcing would not mean forfeiting any posts. The evidence includes a verbatim record of one of the meetings of the Joint Advisory Appeals Board. It shows that a statement to that effect was indeed made at a time when the view still held that whatever firm got the contract would take over staff from the Data Management Division. But the firm which did get the contract would not agree to that. The statement, which was rash, understandably aroused hopes. But it hardly amounted to a specific individual promise on which the complainant may rely.

6. His third plea is that the reason the ESO gave for getting rid of his post was neither true nor sufficient: the real reason for its bringing in the firm was that it wanted to cut costs and limit the number of international staff. It failed to say so and, besides, the savings fell far short of expectations. The Appeals Board went into those arguments at length and reached the conclusion that the subcontracting probably made no savings, that the calculations had been hurried and were unreliable, and that the desire for savings was not the true reason for dropping the complainant's post. But what matters is not whether the ESO's figures were right but whether it gave him the true reason. And the answer is starkly clear. In the exercise of management prerogatives the Observatory chose to farm out work so as to get help from a firm of experts. The upshot was the sacrifice of several posts in the Computer Management and Operation Group: there would, but for that, have been overlap. The complainant knew that full well, and the true reason shows no mistake of fact.

7. Far more telling is his plea that the ESO failed to do its utmost to reassign him. Article R II 6.11 reads:

"A member of the personnel shall not be dismissed owing to the suppression of a post or a general reduction of complement, unless the Director General has ascertained that the member of the personnel cannot be transferred to another post within the Organization."

Quite apart from that written rule, the Tribunal has often declared - see Judgments 269 (*in re* Gracia de Muñiz) under 2 and 1231 (*in re* Richard) under 25, to give both early and recent examples - that:

"an organisation may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment."

Judgment 1553 (*in re* Moreno de Gómez) is apposite too. The rule is not that an organisation must actually find a

job, but that it must at least do its best, and in good time, to place someone whose post is to go.

8. The ESO offers no evidence of having done so, bar the sentence in the head of Personnel's letter of 6 December 1995: "After verification of other job opportunities within the Organisation which would correspond to your qualifications, we, unfortunately, cannot offer you another position" and the bald remark that a post for an "archive system design and engineer" would soon be created and he might apply. That invitation came after the decision had been taken to dismiss him. There was, too, an offer to see with him how the ESO might help him to find a job. But there is no evidence to suggest that the competent units cared a jot about transferring him before his post had actually vanished. The Appeals Board concluded - and the defendant does not challenge its findings on that score - that several heads of department had been asked orally whether they had any post for him. But the quest did not even start until 27 June 1996. That was after the hearings before the Board, which had probably pointed out the administration's breach of R II 6.11, and long after 6 December 1995, the date of the letter notifying the abolition of his post to the complainant.

9. The ESO says, quite rightly, that the verbatim record of the Board's hearings does not have the same authority in law as formal minutes. Yet statements made by some witnesses, undoubtedly in good faith, are worth citing. And the hearings bear out two things: one, that the ESO probably did not do its utmost to get the firm to take on the complainant; and the other, that the head of his unit, the Data Management Division, was unaware of the Observatory's duty under R II 6.11.

10. The conclusion from the foregoing is that the ESO was in breach of its duty to give priority to placing the holder of an abolished post and that the impugned decision cannot stand. That being so there is no need to entertain the complainant's plea of abuse of authority, which in any case is merely another way of stating his previous pleas, or the one about unnecessary and undue injury, for which this judgment will afford redress anyway.

11. What then should that redress be? The ESO is not sure to find him a suitable post, and in the appeal proceedings he said that the payment of damages would do instead of reinstatement. The Tribunal will therefore exercise its discretion under Article VIII of its Statute and, as in Judgment 1586 (*in re* da Costa Campos), let the defendant choose between two options. It shall either reinstate the complainant as from the date of dismissal or pay him damages equivalent to thirty-six months' basic salary, less the amounts it has paid him in terminal and repatriation benefits.

12. This judgment is deemed to afford him redress for the moral injury he alleges.

13. He is also entitled to costs, and the Tribunal sets the amount at 20,000 French francs.

DECISION

For the above reasons,

1. The Director General's decision of 19 September 1996 is set aside.

2. The Observatory shall either reinstate the complainant as from the date of dismissal or pay him damages as reckoned in 11 above.

3. It shall pay him 20,000 French francs in costs.

4. His other claims are dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis

Jean-François Egli

A.B. Gardner

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