

EIGHTY-SIXTH SESSION

In re Adorf (No.3)

Judgment 1790

The Administrative Tribunal,

Considering the third complaint filed by Mr. Hans-Martin Adorf against the European Southern Observatory (ESO) on 29 August 1997 and corrected on 8 December, the ESO's reply of 6 March 1998, the complainant's rejoinder of 18 June and the Observatory's surrejoinder of 27 July 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's career at the ESO was recounted under A in Judgment 1738, which was about his first complaint.

He first took up duty at the ESO on 1 February 1985. According to Articles R II 6.13 and R IV 1.48 of the ESO's Staff Regulations as in force at the time and Annex R A 10 thereto, a staff member whose contract the Observatory has declined to renew is entitled to payment of a termination indemnity equivalent to half a month's basic salary for each unbroken year of service, up to a total of five months.

On 30 October 1996 the head of Personnel wrote to tell him that his contract, which was to expire at 30 April 1997, would not be renewed. On 18 March 1997 the head of Personnel sent him another letter about the amount of his indemnity; it had been worked out on the strength of his six years' service as an auxiliary and established staff member since 1 February 1991, the date at which he had taken up duty as an auxiliary; and so he was entitled to three months' basic salary.

By a letter of 7 May 1997 he appealed to the Director General against the decision of 18 March on the grounds that, having completed 12 years' service since 1 February 1985, he was entitled to the equivalent of five months' basic salary by way of indemnity. He asked for leave to go straight to the Tribunal if his claim was rejected. In a letter of 3 June 1997, the impugned decision, the head of Administration told him that the decision was confirmed and he might go straight to the Tribunal.

B. The complainant challenges the lawfulness of the decision of 27 December 1996 from the head of Administration telling him on the Director General's behalf that no appeal lay against non-renewal. He sees that decision as final rejection of his appeal against the non-renewal.

Contending that for over 12 years he had a fixed-term appointment with the ESO, he cites Article R II 1.16 of the Staff Regulations as in force at 1 April 1993:

"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."

By a decision of 20 October 1989 the Director General gave the complainant one last renewal of contract as a "fellow" for one year. He contends that that was a mistake of law. According to Article R II 1.21 of the Staff Regulations as then in force the initial contract granted to a fellow, which must be for one year, may be extended by one year but only exceptionally by a third. Since the complainant took up duty on 1 February 1985 as a fellow the ESO should have granted him a contract from 1 February 1988 as an auxiliary or established staff member. The reasons that led the ESO to count auxiliary service for the purpose of granting him an indefinite appointment

should apply also to his stint as a fellow, especially since his duties never changed. Citing Judgments 701 (*in re* Bustos), 1385 (*in re* Burt) and 1634 (*in re* Gawlitta), he submits that the distinction drawn between the sorts of appointment he held is artificial.

Since he ought to be treated as having served as a staff member from the outset the Director General erred in law in reckoning his indemnity on the strength of a fixed-term appointment for only six years.

He seeks the quashing of the decision of 3 June 1997 and an award of costs.

C. In its reply the ESO argues that the final decision was the one of 18 March 1997 and that the complaint, not having been filed until 29 August 1997, missed the time limit of ninety days in Article VII(2) of the Tribunal's Statute. The one of 3 June 1997 merely confirmed the earlier one and gave the complainant leave to go straight to the Tribunal.

In the ESO's submission the complaint is in any event devoid of merit. Articles R II 6.13 and R IV 1.48 of the Staff Regulations and Annex R A 10 apply to auxiliaries and to established staff members. Only in exceptional cases will the Tribunal, as it did in Judgment 1385, look behind "the mere wording of the texts to ascertain the parties' real intention".

The defendant acknowledges a flaw in the decisions to grant the complainant new appointments as a fellow after he had served for three years as such. But he consented to the terms of those appointments on signing the contracts and thereby forfeited any right to challenge them. Besides, he was granted from 1 February 1991 contracts as an auxiliary and then as an established staff member. So the proper application of the Staff Rules and Regulations for six years cured any flaw in the earlier contracts.

D. In his rejoinder the complainant observes, as to receivability, that the main purpose of his appeal of 7 May 1997 was to challenge the decision of 18 March. Only to save time did he seek leave to go straight to the Tribunal. He was not to know that his appeal would fail and that he should regard the original decision as the final one.

He presses his pleas on the merits. He contends that the impugned decision was unlawful from the outset and rested on a misappraisal of the evidence. There is nothing to prevent him from pleading its unlawfulness now. Citing Judgment 1317 (*in re* Amira), he contends that his contractual relations with the ESO were flawed with "inadmissible administrative practice".

E. In its surrejoinder the Observatory acknowledges the Tribunal's ruling in Judgment 1739 (*in re* Ansoerge) that the time limit in Article VII(2) of its Statute starts on notification of waiver of the internal appeal.

But it presses its pleas on the merits. It contends that the complainant may not rely on Judgment 1634: he was not denied the protection of the material rules, and the contracts he signed reflected the parties' true intent.

CONSIDERATIONS

1. The background to this case is set out in Judgment 1738, which ruled on Mr. Adorf's first complaint.
2. His contract with the ESO was to end on 30 April 1997 for the reasons set out in that judgment. On 18 March 1997 the head of Personnel sent him a letter about the indemnity he was entitled to on termination.
3. Disagreeing with the amount, he wrote on 7 May 1997 asking the Director General to review it or, failing that, let him go straight to the Tribunal because only issues of law were at stake.
4. On 3 June 1997 the head of Administration wrote to him on the Director General's behalf confirming the decision of 18 March 1997 and giving him leave to go straight to the Tribunal. According to the complaint form the final decision he is challenging is the letter of 3 June 1997.
5. Impugning as it does that decision, the complaint is receivable for the same reasons as those explained in Judgment 1739 (*in re* Ansoerge) under 7. The defendant acknowledges as much in its surrejoinder.
6. The complainant says that in breach of the 1983 version of Article R A 10(b) the ESO has paid him an indemnity reckoned on the strength of only six years' service though he was on its staff for over twelve years.

7. The defendant's answer is that the reckoning is right because it is in line with R II 6.13, R IV 1.48 and R A 10(b). In its submission the complainant had only six years' unbroken service: it takes 1 February 1991, the date at which he signed his contract as "auxiliary", as the start of his service as a staff member, and it discounts the period from 1 February 1985 to 31 January 1991, when he was a "fellow".

8. The provisions that the defendant is relying on say that staff members and auxiliaries are entitled, when their contracts are not renewed, to indemnities in amounts equivalent to half a month's basic salary for each complete year of unbroken service, up to a maximum of five months' basic salary.

9. The defendant has misread its own rules. For the purpose of reckoning the total period of unbroken service they do not, as it makes out, distinguish between a year served as a "fellow" and a year served as a staff member or auxiliary.

10. So the impugned decision cannot stand. The complainant completed 12 years' unbroken service at the Observatory and in keeping with the rules is entitled to payment of an indemnity equivalent to the maximum, i.e. five months' basic salary, less any amount that he has already been paid on that score. He is also entitled to 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 3 June 1997 is set aside.
2. The Observatory shall pay the complainant a termination indemnity in an amount equivalent to five months' basic salary, less any sums already paid to him under that head.
3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 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 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner