

## EIGHTY-EIGHTH SESSION

### *In re Mella Silva*

(Application for interpretation and execution)

Judgment 1909

The Administrative Tribunal,

Considering the complaint filed by Mr Sergio Mella Silva against the European Southern Observatory (ESO) on 27 January 1999, the Observatory's reply of 10 May 1999 and the complainant's waiver of his right to rejoin;

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 Chilean born in 1959, joined the ESO in September 1988 as an electrician on a three-year contract. He worked as a member of the ESO's local staff in Chile at the astronomic observatory at La Silla. On 17 July 1991 his contract was extended until 12 September 1994 and later for another two years until 12 September 1996. In July 1996 he became a Local Staff Association representative.

In a memorandum assessing his services dated 16 July 1996, the complainant's supervisors expressed concern over the poor quality of his relations with colleagues which resulted in work problems. On 29 July 1996 he was offered a one-year extension of contract until 12 September 1997, based on a proposal of his supervisors, in order to allow him time to improve his interpersonal skills. The complainant accepted that extension on 7 August 1996 reserving his "right to request clarifications" of the comments made by his supervisors.

The version then in force of Article LS II 1.13 of the Regulations for ESO Local Staff in Chile limited the period of fixed-term contracts for such staff to "a maximum total period" of nine years, at which point "the Director General will grant an indefinite contract, or the contract will be terminated". The complainant was informed by a letter of 5 August 1997 from the Head of Personnel that he would not be offered an indefinite contract and his appointment would end on 12 September. On 25 August he filed an appeal against this decision with the Director of the ESO in Chile. In a letter dated 22 September the Director informed the complainant that his appeal was rejected. On 7 October 1997 the complainant appealed to the Director General against the decision of the Director in Chile. The appeal was examined by the Local Staff Joint Advisory Appeals Board. The Board, finding procedural errors, recommended that the Director General "negotiate ... extraordinary compensation" with the complainant. It also considered an earlier internal appeal, filed by the complainant on 25 September 1996, in which he requested that the memorandum of 16 July 1996 from his supervisors be removed from his personal file.

In a letter of 15 December 1998 from the Head of Administration the complainant was informed that the Director General upheld his earlier decisions. The letter further stated that the ESO "would be prepared, however, to examine together with [the complainant] possibilities to reach a final and amicable settlement". Since the parties were unable to do so the complainant filed the present complaint with the Tribunal.

B. The complainant pleads breach of his union rights. The decision not to renew his contract after nine years with the ESO was linked to his position as a staff representative. He argues that as a Local Staff Association representative he enjoyed immunity in that his position in the Association "cannot affect his professional career". Certain procedural safeguards provided for by the ESO rules, as well as Chilean labour law, should have been respected prior to any decision to dismiss him.

As the Local Staff Joint Advisory Appeals Board concluded in its report of July 1998, the "Conflicts and

Appeals Board" should have been convened prior to any decision to end his contract. Had this procedure been followed, the Board reasoned, it would have provided the Contract Advisory Committee with more information on which to base its decision. The Board concluded that "an evaluation allowing the extension of a contract just for a period of one year, [after] eight years of service, is virtually a punishment".

The complainant makes three claims for relief. First, he requests that the decision in the letter of 15 December 1998 be quashed, that he be reinstated and that his salary be paid to him as from 12 September 1997 up to the date of reinstatement. Subsidiarily, if reinstatement is not possible, he requests compensation for unjustified dismissal equal to five times his total gross remuneration from 12 March to 12 September 1997, plus interest at 12 per cent a year from the date on which he lodged this complaint.

Secondly, and also subsidiarily, he asks that the ESO should pay him a termination indemnity based on his whole remuneration including the organisation's contribution to the social security scheme ("*asignación previsional*").

Thirdly, he claims an award of costs against ESO as provided for in the Local Staff Regulations.

C. The ESO objects to the receivability of the complainant's second claim requesting a termination indemnity. It contends that this claim is not receivable by the Tribunal as it is an entirely new one that was not raised in the internal appeal procedure. Besides the complainant received such an indemnity on 4 September 1997.

Concerning the complainant's other claims, the ESO submits that these are not well founded in law. In July 1996 the ESO offered the complainant a one-year extension to enable him to demonstrate improvement in his relations with colleagues. The ESO cites the minutes of the Contract Advisory Committee dated 24 April 1997 in which the complainant's contract was discussed. After considering his attitude and performance and the fact that in the future a reduced number of electricians would be needed at La Silla, it was decided not to offer him an indefinite contract. Neither the complainant's direct supervisor nor the head of the competent division recommended an indefinite contract.

The ESO denies that the impugned decision was related to the complainant's position as a staff representative. While as an elected representative he enjoyed some immunity, his position as set out in Article VII 1.05 of the Combined Staff Rules does not entitle him to the protection that he claims. The defendant asserts that termination of the complainant's employment was based on the decision not to offer him an indefinite contract following the expiry of the maximum allowable period for fixed-term contracts. As termination of employment for this reason is not mentioned in Article VII 1.05, the Director General was under no obligation to consult the "Conflicts and Appeals Board" (by which the Observatory assumes the complainant means the Joint Advisory Appeals Board) prior to terminating his employment.

The ESO also points out that, on the recommendation of the Appeals Board, it attempted to negotiate an amicable settlement. These negotiations failed due to the excessive financial demands of the complainant.

## CONSIDERATIONS

1. The complainant was employed as an electrician at the ESO's astronomic observatory at La Silla from 13 September 1988 under four consecutive fixed-term contracts, being two three-year contracts, one two-year contract and a final one-year contract which expired on 12 September 1997. This was the maximum period during which he could be granted fixed-term contracts under Article LS II 1.13 of the Regulations for Local Staff in Chile before an indefinite contract was offered or his contract was terminated. The letter dated 29 July 1996 offering him the final one-year extension reflected the views of his supervisors. In a memorandum appraising his services of 16 July 1996, they had expressed concern about the bad quality of his relations with the personnel of other departments and the resulting problems.

2. On 25 September 1996 the complainant appealed to the Director of the ESO in Chile to withdraw the memorandum of 16 July 1996 from his personal file.

3. The Contract Advisory Committee met on 24 April 1997 to consider whether the complainant should be granted an indefinite contract in accordance with Article LS II 1.13. The complainant's direct supervisor and competent head of division did not support the granting of such a contract. The Committee considered

the complainant's attitude and performance and the reduced number of permanent positions that would be available for electricians in the future. It did not recommend granting an indefinite contract.

4. The complainant was informed by a letter of 5 August 1997 that his contract would not be renewed or extended. He appealed to the Director of the ESO in Chile who rejected the appeal. He then filed a further appeal with the Director General under Article VI 1.07 of the Local Staff Regulations seeking the quashing of the decision to put an end to his contract.

5. The Director General consulted the Local Staff Joint Advisory Appeals Board which considered the two complaints, one regarding the removal of the memorandum of 16 July 1996 from his personal file and the other relating to the decision not to renew his contract.

6. The Board did not recommend the removal of the memorandum but did recommend that:

"Due to the fact that the established instances were not exhausted and that we found procedural errors, we recommend [that] the Director General ... negotiate an extraordinary compensation with [the complainant]."

7. By a letter dated 15 December 1998 the complainant was informed of the Director General's decision to maintain the two decisions. The ESO, however, did offer to examine the possibility of reaching an amicable settlement, but this did not prove possible.

8. The complainant has lodged the present complaint against the decision of 15 December 1998 claiming the quashing of the decision not to renew his contract and his reinstatement with salary from 12 September 1997; alternatively, compensation for unjustified dismissal equivalent to five times his total gross remuneration from 12 March to 12 September 1997 with interest at 12 per cent from the date of his complaint. He also claims to be entitled to the ordinary end-of-service indemnity based on his whole remuneration, including the ESO's contribution to the cost of social security ("*asignación previsional*"). He does not claim any relief in respect of the decision not to remove the memorandum of 16 July 1996 from his file.

9. The complainant, who was a local staff representative from 16 July 1996, claims that there is a "union immunities" principle and that the ESO put an end to his contract without having first convened the "Conflicts and Appeals Board". He points to the coincidence between his election as a staff representative and the notification of extension for one year only. He said the "Conflicts and Appeals Board" should have been convened before the decision not to renew his contract was taken.

10. The Observatory objects to the claim for payment of termination indemnities as being a new claim which was not raised in the internal appeal.

11. Since the complainant has not exhausted the means of internal appeal in accordance with Article VII of the Tribunal's Statute, he cannot pursue this claim before the Tribunal.

12. The ESO submits that at the time of the decision of 5 August 1997 not to renew the complainant's contract the Local Staff Regulations then in force did not contain provisions protecting members of the Local Staff Association. However, as from 1976 the ESO applied the provisions of the rules for international staff. As from 1 July 1991 the relevant rule was contained in Article VII 1.05 of the Combined Staff Rules (corresponding to former article R VII 1.06). This provides that the tenure of office in a staff association shall not affect an elected officer's career and that before any official is dismissed for specified reasons of unsuitability or owing to the suppression of post or a reduction in staff, the Director General shall consult the Joint Advisory Appeals Board.

13. The Observatory points out that the immunity conferred did not require the Director General to consult the Joint Advisory Appeals Board prior to a decision not to extend or renew the complainant's contract. The complainant was not dismissed for any of the reasons specified in Article VII 1.05. Also the relevant rules do not provide for a "Conflicts and Appeals Board"; the ESO assumes that the complainant means the Joint Advisory Appeals Board.

14. ESO submits that the Director General complied with the rules by consulting the Joint Advisory Appeals Board before making a final decision on the internal appeal.

**15. The Tribunal is satisfied that, in those circumstances, the Director General correctly applied the rules and there was no procedural flaw.**

**16. There is no evidence to suggest that the decision not to renew the complainant's contract was in any way connected to, or influenced by, the fact that he was a staff representative. The Contract Advisory Committee was consulted and did not advise granting an indefinite contract. The Director General had valid reasons not to grant such a contract.**

**17. The Tribunal accepts the submissions of the Observatory. Accordingly, the complaint fails.**

## **DECISION**

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs A NAME="Name4">Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 3 February 2000.**

**Michel Gentot  
Mella Carroll  
James K. Hugessen**

**Catherine Comtet**