

The Administrative Tribunal,

Considering the complaint filed by Ms C. G. against the European Southern Observatory (ESO) on 11 October 2005, the Observatory's reply of 12 January 2006, the complainant's rejoinder of 11 April and ESO's surrejoinder of 26 June 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the Observatory's request for hearings;

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

A. The complainant, an Italian national born in 1965, applied for the post of Head of the Finance Department of ESO in September 2004. It was at that time that the Enterprise Resource Planning (ERP) system which ESO had adopted in order to re-engineer its administrative procedures, especially with regard to finance, became operational. Mr B. headed the ERP project team.

The complainant's application was accepted, and she was offered a three-year fixed-term contract beginning on 1 April 2005 with a six-month probation period. On 9 May 2005 the complainant sent her hierarchical superior, the Head of Administration, a report in which she expressed her views and made several critical remarks about the ERP system. In an e-mail of 23 May Mr B. informed the complainant that, while he appreciated her feedback, she should nevertheless contact him first. On 28 June she sent the Head of Administration an updated version of her May report, in which she highlighted the lack of improvement in many areas.

Having been informed by the complainant of difficulties concerning the implementation of the 2005 budget, the Head of Administration sent her an e-mail on 11 July in which he recommended that she refer her queries directly to Mr B. On 15 July, in response to an e-mail from the latter, the complainant drew attention to the fact that she and her team could receive instructions only from the Head of Administration. In a memorandum of 7 August she forwarded her comments on a document concerning the preparation of the 2006 budget, which had been drawn up by Mr B. and reviewed by the Head of Administration. The complainant states that the latter reacted "very negatively" to these comments.

On 7 September, during a meeting with the Head of Administration and the Head of the Personnel Department, the complainant was informed that her performance was deemed unsatisfactory. On 12 September she learned that her contract would be terminated at the end of her probation period; then, on 22 September, the Director General announced that the Internal Auditor had been appointed acting Head of Finance. The parties tried vainly to arrive at an amicable settlement of the dispute between 26 and 28 September. In a letter of 29 September 2005, which constitutes the impugned decision, the Head of the Personnel Department informed the complainant that, for the "reasons given in the report by [her] hierarchical superior" – the Head of Administration – the Director General had decided to dismiss her during her probation period with effect from 31 October. He explained that her overall performance had been unsatisfactory and he asked her to take special paid leave from 29 September to 31 October 2005.

B. While the complainant accepts that the chief executive officer of an organisation has the discretionary power to dismiss a probationer, she emphasises that this power must not be exercised arbitrarily since, according to the case law of the Tribunal, the probationer enjoys certain safeguards which, in the instant case, were breached. She contends that the Administration did not give her any warning and did not establish a performance report. Moreover, she has still not received the report of the Head of Administration on which the impugned decision rests. In her opinion this is a "definite violation" of her right to be heard. Furthermore, the report in question cannot be the sole basis for the decision not to confirm her appointment because, under Article R II 1.20 of the Staff Regulations, the hierarchical superior of a probationer must make several detailed reports before a decision on

dismissal is reached.

Referring to Judgment 1386, the complainant states that ESO ought to have provided “proper conditions for probation”, but this was not done. Although she was supposed to report directly only to the Head of Administration, she claims that he constantly asked her to refer her queries to Mr B., to whom in theory she was not in any way subordinate. She adds that this situation was bound to give rise to tension, especially as Mr B. and his team could introduce changes in accounting procedures without informing her. Lastly, the complainant accuses the Observatory of having “severely impaired” her dignity and reputation.

The complainant asks the Tribunal to quash the decision of 29 September 2005 and to award her a sum equivalent to two years’ gross salary, plus allowances, as compensation under all heads. She also claims costs.

C. In its reply ESO asserts that it was in its interest to dismiss the complainant and that this decision was fully justified. The complainant was incapable of fitting into the Observatory’s administrative and hierarchical structure or of adjusting to the ERP system, and she tried to impose her personal views as to how the responsibilities should be distributed.

ESO draws attention to the fact that the Tribunal may conduct only a limited review of a decision to dismiss a probationer. It states that its Staff Rules and Regulations do not describe in detail the procedure to be followed when the Director General must decide whether or not to confirm the appointment of a probationer. All that is required is that the probationer’s hierarchical superiors should have supplied the Director General with either written or oral “detailed reports” during the probation period, to enable the latter to reach an informed decision. The Observatory submits that in this case the Head of Administration provided “regular reports” on the complainant to the Director General.

Moreover, ESO states that the complainant was given the possibility to defend her interests during various meetings and discussions. She was heard by her hierarchical superior on several occasions and had a meeting with the Director General on 16 September 2005. During these meetings her superior urged her to cooperate with the ERP team and to avoid confrontation, but she was apparently unable to change her position. The Observatory asks the Tribunal to give it an opportunity to “prove the fact and the content” of these meetings by allowing the Head of Personnel and the then Head of Administration to provide oral testimony.

D. In her rejoinder the complainant notes that the Observatory has not supplied proof that the Head of Administration did in fact submit “regular reports” to the Director General and that, in particular, it has not produced the report mentioned in the letter of 29 September 2005. She considers that probationers are entitled to have access to the detailed reports concerning them. If, in her case, the Head of Administration chose to report orally to the Director General, she argues that she should have been present during the meetings in question. She considers that the hearings requested by ESO would serve no purpose.

The complainant also submits that, in dismissing her, the Observatory parted with “a competent professional person who wished to be part of the world of international organisations, but who made the mistake of wishing to introduce transparency into ESO’s finances and accounting [...] in order to avoid certain inadvisable practices”. She adds that it was hard for her to cooperate with the ERP team since Mr B. never attended meetings and was “rather reluctant” to work with women. She contends that she has suffered moral injury owing to the “constant psychological pressure” inflicted on her, to her “abrupt dismissal” and to the “extremely hurtful and humiliating manner” in which she was treated.

E. In its surrejoinder ESO categorically rejects, as being unfounded, the suggestion that the complainant was discriminated against because she is a woman. The Observatory contends that there was no question of placing the complainant under Mr B.’s authority but rather of establishing constructive cooperative relations between him and the Finance Department.

It also draws attention to the fact that it has offered to prove that the Director General did receive “detailed verbal reports” by requesting a hearing of two witnesses. The complainant, for her part, has not proved that the impugned decision is tainted with formal or procedural flaws.

Lastly, ESO submits that the amount of compensation claimed by the complainant is disproportionate. It adds that, in any case, she is not entitled to moral damages since all probationers face the risk of not having their appointment

confirmed.

## CONSIDERATIONS

1. The complainant, who entered the service of ESO on 1 April 2005 as Head of the Finance Department on a three-year contract, was required under Article R II 1.20 of the Staff Regulations to complete six months' probation. At the end of this probation period she was informed that her appointment was to be terminated on 31 October 2005 because her performance had been unsatisfactory. In a complaint filed with the Tribunal on 11 October 2005, she challenges the decision to dismiss her.

2. The complainant asks the Tribunal to quash the final decision to dismiss her which was taken by the Director General of the Observatory and of which she was notified in a letter of 29 September 2005 from the Head of the Personnel Department, and to award her a sum equivalent to two years' gross salary, plus allowances, as compensation under all heads. She also claims costs.

3. The complainant submits that, although the chief executive officer of an organisation has the discretionary power to dismiss a probationer, this power should not be exercised arbitrarily. She adds that, in her case, the Observatory did not allow her "proper conditions for probation".

She further contends that her dismissal for unsatisfactory performance was in breach of the Tribunal's case law insofar as it was not preceded by any warning and was not based on any performance report. She asserts that the provisions of Article R II 1.20 of the Staff Regulations have been infringed because, under that article, a probationer's hierarchical superior must make "several reports" so as to enable the Director General to decide whether or not to confirm the probationer's appointment. The complainant notes that, in her case, the letter of 29 September 2005 states that her dismissal is based on "the reasons given in the report by [her] hierarchical superior". She does not even know if this report exists. At all events it has never been communicated to her, because she asked in vain for a copy on 29 September and 1 October 2005. For this reason she believes that there has been a "definite violation" of her right to be heard and that the seriousness of this violation is in no way mitigated by the meetings she was able to secure with the former Head of Administration and/or the Head of the Personnel Department or even the Director General.

4. The Observatory asserts that it was in its interest to terminate the complainant's appointment and that this decision was fully justified.

It contends that its Staff Rules and Regulations do not lay down a detailed procedure enabling the Director General to decide whether or not a probationer's appointment is to be confirmed. It explains that it is hence possible that these Rules and Regulations differ from those of other organisations in that it is sufficient for a probationer's hierarchical superiors to provide the Director General with "detailed reports" during the probation period. These can be written or oral reports. What is crucial is that the Director General has detailed information about the probationer so that she can take a reasoned decision whether or not to confirm his or her appointment. In this respect, ESO adds that the Director General had received continuous reports on the complainant's performance.

Lastly, the Observatory submits that the complainant has been unable to prove the existence of formal or procedural flaws which could give the Tribunal cause to interfere with the Director General's decision.

5. Article R II 1.20 of ESO's Staff Regulations reads as follows:

"The first 6 months' service shall be regarded as a probation period. If so required by circumstances this probation period may be extended, but it shall not exceed 12 months.

[...]

On the basis of detailed reports, made during the probation period by the hierarchical superiors of the member of the personnel, the Director General shall decide whether or not to retain the member of the personnel in the Organization."

According to the Tribunal's case law, to which the Observatory itself refers, the Director General's decision not to confirm the appointment of a probationer is a discretionary one. Its power of review being limited, the Tribunal

will set the decision aside only if it finds a mistake of fact or of law, or a formal or procedural flaw, or a clearly mistaken conclusion on the evidence, or neglect of an essential fact or abuse of authority. The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the organisation. The competent authority will determine on the evidence before it whether or not to confirm the appointment and must be allowed the utmost measure of discretion in deciding whether someone it has recruited shows, not just the professional qualifications, but also the personal attributes for the particular post in which he is to be working. Only where the Tribunal finds the most serious or glaring flaw in the exercise of the Director-General's discretion will it interfere (see Judgment 1246, under 3). The Tribunal reaffirmed that view in Judgments 2427 and 2558, amongst others.

6. In the instant case the impugned decision states that the complainant's dismissal was based on the reasons set out in her hierarchical superior's report. The point at issue is therefore whether this decision was consonant with the rules and regulations, general principles of law and the Tribunal's case law.

While it would be inappropriate to analyse the reasons given for the termination of the complainant's appointment and pointless to dwell on the number of detailed reports made to the Director General, the Tribunal notes that there is no evidence to prove that the complainant was given any kind of access to the report on which the Director General is said to have based her decision to dismiss her.

It may be concluded from the above and from the evidence in the file that the impugned decision was taken in breach of the safeguards regarding the provision of proper conditions for probation, resulting from the rules and regulations, from general principles of law and from the Tribunal's case law, and, in particular, in breach of the complainant's right to be heard.

The impugned decision must therefore be quashed.

7. The complainant notes, in respect of the material injury she has suffered, that her salary was to have been reviewed at the end of the probation period, as it was lower than that which she had received in her previous job. In the event, some seven months after being recruited by ESO, she found herself unemployed, without really having been given the opportunity by the Observatory to carry out her duties in accordance with her job description and to the satisfaction of her hierarchical superior.

She believes that she has suffered serious moral injury, for her dismissal is a "blemish" on what she says was hitherto an exemplary career. She states that her morale has been shaken by her dismissal and that she was particularly hurt by the abrupt nature of the measure and the publicity given to it.

The Observatory considers that the complainant is not entitled to damages, particularly for moral injury. It aptly notes that any person seeking employment faces the inherent risk of a probation period. It disputes the allegation of "harassment" which a medical certificate produced by the complainant purported to prove and it adds that the medical examination undergone by the complainant at the end of her contract did not reveal the existence of any illness contracted as a result of or in connection with her period of service with the Observatory.

On the basis of the parties' submissions the Tribunal finds that the complainant has suffered both material and moral injury owing to her dismissal. It notes that the Observatory entered into negotiations with the complainant with a view to terminating her contract by mutual agreement; that these negotiations failed as no agreement could be reached on the amount of compensation proposed by the Observatory, which was ultimately the equivalent of ten months' salary for an appointment lasting seven months; and that the complainant has been in a new job since 1 March 2006.

In view of all these factors, the Tribunal considers that it would be fair to award the complainant an amount equal to 12 months' salary, less the amounts already paid as unemployment benefit, in compensation under all heads.

8. The complainant is entitled to the sum of 3,000 euros in costs.

## DECISION

For the above reasons,

1. The decision of 29 September 2005 is quashed.

2. ESO shall pay the complainant compensation equivalent to 12 months' salary, less the amounts already paid as unemployment benefit.

3. It shall also pay her the sum of 3,000 euros in costs.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet