

Ö. (No. 3)

v.

ESO

125th Session

Judgment No. 3915

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs B. Ö. against the European Southern Observatory (ESO) on 1 August 2016 and corrected on 21 September, ESO's reply of 15 November 2016, the complainant's rejoinder of 31 January 2017 and ESO's surrejoinder of 16 February 2017;

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

Having examined the written submissions;

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

The complainant requested ESO to provide her with a reference certificate satisfying the requirements of German law.

The complainant, a German national, began working for ESO in 2008 at ESO's Headquarters in Garching, Germany. She held several short-term contracts concluding with ESO a three-year fixed-term contract with effect from 1 January 2013. By a letter dated 27 May 2015, the complainant was informed that her contract would not be renewed beyond its expiry on 31 December 2015.

By an email of 31 August 2015, the complainant requested the Head of Human Resources to provide her with a reference certificate satisfying the requirements of German law (a so-called "*qualifiziertes Zwischenzeugnis*"). She explained that a work certificate as delivered

by ESO would not suffice as it would not meet the expectations of German companies.

On 14 December 2015 the Head of Human Resources provided the complainant with a “letter of recommendation”. On 14 January 2016 the complainant – who had left ESO on 31 December 2015 – replied that this letter did not meet the definition or the standards required for a German reference certificate. She submitted a draft version of a reference certificate and requested the Head of Human Resources to issue her such a certificate by 22 January. On 3 February the Head of Human Resources informed her that the Staff Rules and Regulations did not provide for a reference certificate to be delivered to staff members upon termination of their contract. Moreover, as an international organisation, ESO was not bound by the laws of the Federal Republic of Germany and it was therefore under no obligation to issue the requested reference certificate.

On 4 April the complainant lodged an appeal with the Director General against that decision. By a letter dated 28 April 2016, which was received by the complainant on 3 May 2016, the Head of Human Resources informed her on behalf of the Director General that her appeal was rejected as, under Staff Rule VI.1.01 and Staff Regulation R VI 1.02, the internal appeal procedure was not open to former staff members. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to quash the decision of 28 April 2016 as well as the decision of 3 February 2016 and to order ESO to provide her with a reference certificate that meets the standards required under German law and those of the German labour market. Alternatively, she asks the Tribunal to order ESO to provide her with a reference certificate of which she supplies a draft. In addition, she seeks costs.

ESO asks the Tribunal to dismiss the complaint as irreceivable under Article VII, paragraph 2, of the Tribunal’s Statute, and as devoid of merit.

CONSIDERATIONS

1. The complainant impugns the decision of 28 April 2016, which rejected her appeal against the decision of the Head of Human Resources dated 3 February 2016. This latter decision informed the complainant that ESO was under no obligation to issue a reference certificate in the terms in which she requested. By the decision of 28 April 2016, the complainant, who had separated from the organization on 31 December 2015, was informed that, as the internal appeal procedure was, according to Staff Rule VI 1.01 and Staff Regulation R VI 1.02, exclusive to members of personnel, her appeal was rejected.

2. ESO argues that, since the complainant, as a former member of personnel, had “no right to appeal”, she should have contested the decision of 3 February 2016 directly before the Tribunal within the ninety-day time limit specified in Article VII, paragraph 2, of the Tribunal’s Statute. As she did not do so, her complaint is, according to ESO, irreceivable.

Staff Rule VI 1.01 and Staff Regulation R VI 1.02 confer the right to lodge an internal appeal upon a member of ESO’s personnel, but they do not so provide for former members of personnel. Accordingly, in Judgment 2461, under 1 and 2, the Tribunal stated as follows:

“1. The complainant challenges a decision of [ESO] which refers to his letter of appeal dated 8 August 2003. The impugned decision is dated 11 August 2003 and states that since the complainant is no longer a staff member ‘the internal appeal is not receivable’ according to Article R VI 1.02 of the Staff Regulations.

2. The organisation is correct. The Staff Regulations do not give him any right of internal appeal. The Tribunal finds that no error of law has been made by [ESO].”

3. On 3 February 2016 when the complainant was informed of the decision not to issue her with the reference certificate in the terms in which she requested, she was a former member of personnel having separated from the organization on 31 December 2015. There was therefore no error in the decision of 28 April 2016, since her status as a former member of personnel still obtained on 4 April 2016 when she

lodged the purported appeal against that decision with the Director-General.

Under Article VII of the Statute of the Tribunal, in order for a complaint to be receivable, not only must it be directed against a final decision (paragraph 1), but it must also be filed within ninety days after the complainant was notified of the decision impugned (paragraph 2).

As the complainant did not have any right of internal appeal, she was thus entitled to file a complaint directly with the Tribunal to contest the decision of 3 February 2016 (see, for example, Judgment 3679, consideration 4), which constituted the final decision in this matter for the purposes of Article VII of the Statute of the Tribunal.

The complainant filed her complaint on 1 August 2016, beyond the ninety-day time limit stipulated in the Statute of the Tribunal for challenging the decision of 3 February 2016.

It follows that the complaint is irreceivable and that it thus should be dismissed.

4. In any event, the complaint is unmeritorious.

The complainant argues that ESO was obliged to provide her with a reference certificate that meets the standards required under German law and those of the German labour market.

However, it is firmly established in the case law that the conditions of employment of staff members are subject to the Staff Rules and Regulations of the organisation that employs them and to the general principles of the international civil service and that national laws do not apply, unless where there is express reference thereto (see, for example, Judgment 1311, under 15). In this instance, there is no such reference in ESO's regulatory regime requiring that ESO provides members of personnel with reference certificates that meet the standards required under German law. Furthermore, as was relevantly stated in Judgment 2611, under 8, "the complainant points to nothing in the terms of h[er] appointment to suggest that German law, as distinct from the [ESO Staff Rules and Staff] Regulations, was applicable to any aspect of h[er] employment".

The Tribunal's case law makes it plain that while an international organization is obliged to issue a reference certificate if required to by its own internal rules, it is not obliged to issue such a certificate in compliance with the laws of a host country. The following was stated in Judgment 841, under 2.

“The rules do not require the ESO to provide the complainant with a performance assessment on the termination of his employment either in the form he seeks or in any other. The ESO is therefore not in breach of any term of the complainant's contract of employment in failing to provide him with a performance assessment. Further, as an international organisation it is not bound by the requirements placed on employers by the laws and usage of the Federal Republic [of Germany].”

Contrary to the complainant's assertion, this statement of principle is applicable whether an ESO's member of personnel was employed under a fixed-term contract, as in Judgment 841, or under a short-term contract, as the complainant was when she joined ESO. The Tribunal notes however that, in keeping with its practice, ESO issued to the complainant a document entitled “letter of recommendation” setting out the duration of the contractual relationship and the main area of her activities.

5. In the foregoing premises, the complaint will be dismissed. The complainant's request for an oral hearing will also be consequentially dismissed as it would serve no practical purpose.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ