

V.
v.
ESO

128th Session

Judgment No. 4146

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. V. against the European Southern Observatory (ESO) on 18 September 2017 and corrected on 26 September, ESO's reply dated 22 December 2017 and corrected on 11 January 2018, the complainant's rejoinder dated 23 April, corrected on 3 May, and ESO's surrejoinder of 25 June 2018;

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 contests the decisions not to grant him a contract of indefinite duration and not to extend his fixed-term contract beyond nine years of service.

The complainant joined ESO in January 2009 under a three-year fixed-term contract. In 2011 he successfully applied for a position in the European Extremely Large Telescope (E-ELT) Programme, to which he was assigned on 1 July 2013. From 1 January 2012 until 31 December 2017 he received successive contract extensions bringing his total length of service with ESO to nine years. He separated from service upon the expiry of his last contract extension on 31 December 2017.

In April 2014 the complainant was considered for an indefinite contract by the Indefinite Appointment Advisory Board (IAAB). However, he was informed by letter of 22 May 2014 that, following the IAAB's recommendation, the Director General had decided that he would be reconsidered for an indefinite contract in October 2015 at the latest. The stated reason was that he had only recently taken up his position in the E-ELT Programme and that more time was needed before a proper evaluation for the purpose of granting an indefinite contract could be done.

In the event, the complainant was not considered for an indefinite contract in October 2015. He was informed by letter of 26 October 2015 that his case would be reconsidered by the IAAB in April 2016, which would enable his supervisor to monitor more effectively his progress through the achievement of particular objectives, thereby permitting a more accurate and potentially positive review of his performance.

The complainant's performance for 2015 was rated as "Partial performance: partially achieved objectives, and/or needs some improvement in key competencies to fully meet the role requirements". His case was reconsidered by the IAAB in April 2016 but, further to the IAAB's recommendation, the Director General decided that his case would be reconsidered by the IAAB in 2017. The stated reason was that, although the improvements required of him in relation to his visibility and leadership role had been achieved, it was not clear if these improvements could be continuously sustained over a longer-term period, which was an essential factor in the decision to grant an indefinite contract. The 7 June 2016 letter also notified the complainant of the decision to offer him a final extension of his fixed-term contract until 31 December 2017. The complainant's performance for 2016 was rated as "Strong performance: fully achieved objectives, consistently met role requirements and demonstrated key competencies".

The granting of an indefinite contract to the complainant was again considered by the IAAB in June 2017. In May 2017, in the run-up to the IAAB's June meeting, the complainant's supervisor recommended against granting him an indefinite contract. By a letter dated 20 June 2017, which is the impugned decision, the complainant was notified of the

Director General's decision, taken further to the IAAB's recommendation, not to award him an indefinite contract for the reason that he had not observed in a consistent manner the improvements needed to perform the role of his position and could not continuously sustain them at the expected level over a longer-term period. By the 20 June 2017 letter, the complainant was also notified of the decision not to extend his fixed-term contract beyond the nine-year service limit and thus to allow it to expire on 31 December 2017.

The complainant asks that the impugned decision of 20 June 2017 be quashed and that he be granted a contract of indefinite duration. Alternatively, he asks that ESO be "committed to decide the case again", observing the Tribunal's findings, and to initiate the process for granting him an indefinite contract at the IAAB or, at the very least, a contract extension for a period of three years.

ESO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal remedies and unfounded.

CONSIDERATIONS

1. The complainant requests an oral hearing under Article 12, paragraph 1, of the Tribunal's Rules but the parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case. The request for an oral hearing is therefore refused.

2. The letter of 20 June 2017, which was issued by the Head of Human Resources on behalf of the Director General, informed the complainant of two decisions regarding his employment with ESO. The first was that after careful examination and discussion by the IAAB and following its recommendation, the Director General had decided not to award him an indefinite contract. The other decision was that, as an extension of his fixed-term contract as an international staff member of ESO would not be granted beyond the nine-year limit "in accordance with Article R II 1.16 Staff Rules and Regulations", his contract with ESO would come to its natural end on 31 December 2017. In impugning

these decisions in his complaint, filed on 18 September 2017, the complainant seeks the following relief:

- (1) that the decision of ESO dated 20 June 2017 be quashed;
- (2) that he be granted a contract of indefinite duration;
- (3) alternatively, that “ESO is to be committed to decide the case again observing the Administrative Tribunal’s findings and to enter into proceedings to grant an indefinite contract at the IAAB”;
- (4) or, otherwise, that he be granted a contract extension for another three years beginning on 1 January 2018.

3. The case law of the Tribunal states that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment and, *a fortiori*, whether to convert it into an indefinite one. Although the exercise of such discretion is not unfettered, it is subject to only limited review, as the Tribunal will respect the organisation’s freedom to determine its own requirements. Accordingly, the Tribunal will only set aside such decisions if they were taken without authority or in breach of a rule of form or of procedure, or if they rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 3772, under 5).

It is within the Tribunal’s purview to quash the decisions that are challenged, if they are vitiated by any of the deficiencies described above. However, given that a decision whether or not to renew a fixed-term appointment or whether to grant a contract of indefinite duration is within the Director General’s wide discretion, the Tribunal will not order ESO to grant the complainant either of the contracts that he seeks in his second and fourth claims for relief.

4. ESO raises receivability as a threshold issue. It contends that the decision which the complainant impugns was not a final decision so that he did not exhaust the internal means of redress before he filed his complaint, as Article VII, paragraph 1, of the Tribunal’s Statute requires. The case law states that in order to satisfy this requirement a complainant must not only follow the prescribed internal procedure for

appeal but she or he must follow it properly and observe any time limit that may be set for the purpose of that procedure.

5. Article VI 1.01 of the ESO Staff Rules gives every member of personnel the right to appeal against any decision of the Director General. Under Article VI 1.03 of the Staff Rules, such an appeal shall be first made to the Director General who must consult a Joint Board before taking a final decision, which is appealable to this Tribunal pursuant to Article VI 1.04 of the Staff Rules. However, Article VI 1.02 of the Staff Rules provides three exceptions to this appeal procedure, the second of which refers to decisions “not to renew or extend a contract”. The complainant states that the impugned decision falls under this exception which means, in effect, that it was not subject to an appeal to the Director General but appealable directly to this Tribunal. He notes that, at its conclusion, the letter of 20 June 2017 stated that he should regard it as the official notification in accordance with Articles R II 6.01 b) and R II 6.03 of the Staff Regulations that govern the extension of a fixed-term contract.

6. ESO disputes that the decision not to grant the complainant an extension of his contract beyond nine years is exempted from the internal appeal procedure by virtue of the provision in Article VI 1.02 of the Staff Rules referred to above. It moreover states that it is questionable whether the complaint is directed against that decision. The Tribunal notes that in the impugned decision (contained in the letter of 20 June 2017) ESO itself treated the decision as addressing, among other things, whether there should have been “an extension of [the complainant’s] fixed-term contract”. Moreover, it is evident from the complainant’s claims for relief set out in consideration 2 above that he is also challenging that decision, which is therefore receivable in the Tribunal pursuant to the second exception in Article VI 1.02 of the Staff Rules and Article VII, paragraph 1, of the Tribunal’s Statute.

7. ESO argues that the decision not to grant the complainant a contract of indefinite duration does not fall under the exception in Article VI 1.02 of the Staff Rules. It points out that this decision and the decision not to grant him an extension of contract beyond the

statutory nine years' limit are governed by different provisions: the former by Article R II 1.17 and the latter by Article R II 1.16 of the Staff Regulations. ESO submits that the wording and structure of these provisions do not permit treating the grant of an indefinite contract as a conversion or continuation of a preceding fixed-term appointment for the purpose of receivability and that, therefore, the grant of an indefinite contract does not fall within the exception concerning decisions "not to renew or extend a contract" in Article VI 1.02 of the Staff Rules.

8. As a precursor to reproducing Articles R II 1.16 and R II 1.17 of the Staff Regulations, it is observed that in his first fixed-term contract with ESO the complainant agreed, among other things, that "[t]he contract is subject to the provisions of the Staff Rules and Regulations and to changes of statutory elements as well as to all other relevant official instructions". This means that the applicable version of the Staff Regulations when the impugned decision was given and when the complainant filed his complaint was that which was in force as from 1 January 2017. Articles R II 1.16 and R II 1.17 of that version state as follows:

"R II 1.16 Duration of contracts

Except as provided for in Article R II 1.17, staff members shall receive on appointment a fixed-term contract of not more than three years duration. This contract may be extended for not more than 3 years' duration, once or more often, but shall not exceed a total period of 9 years. The Director General may exceptionally grant one fixed-term contract beyond the limit of 9 years.

R II 1.17 Indefinite Contract

A new contract of indefinite duration may be granted after 4 years' service if the nature of the post and the qualification of the Staff Member justify it and on conditions and definitions laid down by the Director General. Exceptionally, the Director General may offer such a contract at the time of initial appointment or before the expiration of the period.

The Staff Rules and Regulations, valid at the date of the signature of the contract, are applicable including any later statutory amendments which may be duly made thereto.

Unless otherwise stated in the contract, a new contract of indefinite duration shall not be subject to the provisions regarding the probation period, medical examinations as well as to the allowances, benefits and payments granted on taking up duty."

9. Article R II 1.17 refers to a contract of indefinite duration as a new contract. The grant of such an appointment is not therefore comprehended by the exception under Article VI 1.02 of the Staff Rules. The complainant should have pursued an internal appeal against the decision not to grant him a contract of indefinite duration. He did not. Accordingly, this aspect of his complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute.

10. The complainant contends that the decision not to grant him an extension of his fixed-term contract is vitiated by what amounts to an error of law, a misuse of power, a failure to act fairly, in good faith and in the interest of transparency, and a breach by ESO of its duty of care towards him. The Tribunal recalled, in Judgment 3861, under 9, that the principle of good faith and the concomitant duty of care require international organisations to treat their staff with due consideration in order to avoid causing them undue injury, and that an employer must consequently inform officials in advance of any action that may imperil their rights or harm their rightful interests. The Tribunal has also observed that in order for there to be misuse of authority, it must be established that the decision rested on considerations extraneous to the organisation's interests and that the staff member alleging abuse of authority bears the burden of establishing the improper purpose for which the authority was exercised (see, for example, Judgment 3193, under 9). The Tribunal discerns no evidential basis to hold that the decision not to extend the complainant's fixed-term contract of employment beyond the nine-year service limit is vitiated by a misuse of power, a breach by ESO of its duty of care towards the complainant or a failure to act fairly, in good faith, or in the interest of transparency. These pleas are unfounded.

11. Regarding the vitiating error of law, the complainant argues that the impugned decision wrongly stated that there was a nine-year service limit for international staff under fixed-term contracts pursuant to Article R II 1.16 and that, therefore, his contract was not to be extended beyond the nine-year limit. He states that when he joined ESO in January 2009 the total service limit under fixed-term contracts was twelve years, not nine, as the impugned decision stated. He refers to

Article R II 1.16 of the Staff Regulations then in force, which relevantly stated that “[s]taff members shall receive on appointment a fixed-term contract of not more than 3 years duration. This contract may be extended for not more than 3 years’ duration, once or more often, to cover a total period of up to 12 years”. He submits that he is entitled to the benefit of this provision pursuant to the doctrine of acquired rights. This submission fails, as the complainant had agreed in his first contract with ESO that his appointment was subject to the provisions of the Staff Rules and Regulations and to changes of statutory elements, as well as all other relevant official instructions. Since this term was incorporated by reference into his succeeding contracts the applicable provision at the material time was the version of Article R II 1.16 of the Staff Regulations that was in force as from January 2017. Under it, nine years was the total time of service for the complainant who was serving under fixed-term contracts. There was, therefore, no error when the impugned decision so stated. The complainant’s plea of a vitiating error of law therefore fails.

12. In the foregoing premises, the complaint is in part irreceivable and in part unfounded and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 22 May 2019, 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 3 July 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ