

EIGHTY-SEVENTH SESSION

In re Palma (No. 4)

Judgment 1844

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 3 March 1998, the ESO's reply of 8 May, the complainant's rejoinder of 29 May and the Observatory's surrejoinder of 10 August 1998;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 12 February 1998 addressed to the head of Administration of the ESO, the complainant requested payment of five months' salary in lieu of notice of the non-renewal of his contract. He referred to a letter from the head of Personnel, dated 26 January 1995, informing him that his contract, which came to an end on 31 August 1995, would not be renewed. He considered that he was entitled to twelve months' notice instead of the seven months that he received. By a letter dated 13 February the head of Administration rejected his request on behalf of the Director General. This is the impugned decision.

B. The complainant contends that he has the "administrative right" to "finalize" all outstanding accounting and administrative procedures relating to his previous employment. He submits that, in accordance with two internal memoranda dated 13 December 1976 and 21 October 1988, he should have received one year of notice of the non-renewal of his contract, as was granted to colleagues who were in a similar situation to his. He therefore considers that he has been subject to discrimination. He also cites in support of his plea for compensation Convention No. 158 of the International Labour Organization concerning Termination of Employment at the Initiative of the Employer.

He contends that he had advised the head of Personnel, by a letter of 5 July 1995, that while awaiting the judgment of the Tribunal on the non-renewal of his contract, he considered any indemnity received as "preliminary". He also contends that the Observatory, by a letter of 15 January 1998, agreed to extend the period for claiming payment of indemnities for up to three months following the announcement of Judgment 1718.

The complainant asks the Tribunal to quash the impugned decision, to order the payment of a sum in lieu of notice of the non-renewal of his contract and to award him costs.

C. In its reply, the Observatory notes that the complainant appealed against the decision not to renew his contract to the Tribunal on 19 July 1995, but later withdrew his complaint. The Observatory submits that the complainant, who chose not to appeal, can no longer plead flaws in that decision. His complaint is therefore irreceivable.

It observes that the letter of 15 January 1998 concerns only removal expenses and is not therefore material to this case.

D. In his rejoinder, the complainant maintains that his complaint is receivable and he says that his letter of 5 July 1995 imposed a "moratorium" on all issues relating to the indemnities to which he was entitled. He refutes the contention by the Observatory that he did not appeal against the decision not to renew his contract and he endeavours to show that he appealed on 31 May 1995, as soon as he found out the reasons for the decision.

He also maintains that the decision to bring an end to his employment could not be the subject of an internal appeal but had to be referred directly to the Tribunal and denounces the bad faith of the Observatory. Finally, he submits that his request for compensation in lieu of a notice period is not the same as the challenge to the decision not to renew his contract. Whether or not he appealed against that decision is therefore immaterial to the receivability of this complaint.

E. In its surrejoinder, the Observatory reaffirms its arguments. It agrees that the decision to bring to an end the contract of the complainant had to be referred directly to the Tribunal, but observes that this was not done. It adds that, in accordance with the Staff Rules and Regulations, the complainant was entitled to six months' notice of the expiry of his contract.

CONSIDERATIONS

1. The complainant joined the ESO on 1 September 1989. By a letter of 26 January 1995, the head of Personnel gave him notice that, on the basis of the recommendation of the Contract Advisory Committee, the Director General had decided not to offer him an indefinite contract and not to renew his three-year contract when it expired on 31 August 1995.
2. On 3 May 1995 the complainant told the head of Administration that there were no records in his personal file relevant to the decision not to renew his contract and asked that the relevant documents be included in his personal file so that he could examine them and decide upon a possible appeal. On 8 May the head of Personnel informed him that this had been done on 3 May, the delay being attributed to "backlog in Personnel Administration".
3. Articles VI 1.01 to 1.04 of the ESO Staff Rules give every member of staff a right to appeal to the Director General against any decision taken by him other than not to renew or extend a contract.
4. The complainant appealed to the Director General by a letter dated 31 May 1995 in which he acknowledged that he could not in fact appeal internally, but was entitled to go directly to the Tribunal. The Director General replied on 13 June that appeals had to be lodged within a given period of time after notification of the disputed decision; that this period had expired; and that no appeal lay against the decision not to grant him an indefinite contract.
5. On 19 July 1995 the complainant lodged a complaint with the Tribunal challenging the decision of 26 January, which he later withdrew on 22 December 1995.
6. On 12 February 1998 the complainant wrote to the head of Administration alleging that he had only been given seven months' notice of termination though entitled to twelve. He claimed five months' salary in lieu of notice. On 13 February the head of Administration refused on the Director-General's behalf to reopen any issues relating to his contract which had terminated in August 1995.
7. The complainant thereupon lodged this complaint on 3 March 1998. He contends that the letter of 26 January 1995 gave no reason for the decision not to renew his contract; that the relevant documents were not placed in his personal file until 3 May 1995; and that the practice of the ESO was to give one year's notice of non-renewal. It is unnecessary to consider these arguments as the Tribunal upholds the ESO's plea that the complaint is irreceivable.
8. The complaint relates to the insufficient notice of non-renewal of the complainant's contract. The complainant's only right of appeal was to the Tribunal, and under Article VII(2) of its Statute a complaint should have been lodged within ninety days. Even on the assumption that a new time limit commenced on 3 May 1995 - the date at which the reason for the impugned decision was made known to the complainant (see Judgment 1230 (*in re* Filatkin) under 3) and the ESO made the relevant documents available to him - a complaint should nevertheless have been lodged within ninety days of that date. The present complaint is thus more than two years out of time.
9. The complainant argues that by a letter dated 15 January 1998 the head of Administration, on behalf of the Director General, agreed to extend the period within which the complainant could claim indemnities by up to three months after the Tribunal's ruling on his first complaint (Judgment 1718 of 29 January 1998). However, this letter was clearly restricted to his claim for removal expenses and was quite unrelated to the present complaint. It neither constituted a waiver of the ESO's right to rely on the time limit, nor did it have the effect of giving rise to a new one.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll
Mark Fernando
James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.