

SEVENTY-SEVENTH SESSION

In re ZAGO

Judgment 1349

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lorenzo Zago against the European Southern Observatory (ESO) on 23 June 1993, the ESO's reply of 27 September, the complainant's rejoinder of 17 December 1993 and the Observatory's surrejoinder of 15 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article IV 1.02 of the Combined Staff Rules of the ESO and Articles R II 1.17, R II 6.03 and R II 6.11 of the ESO Staff Regulations;

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. Article R II 1.17 of the ESO Staff Regulations says that a staff member's initial fixed-term contract may be extended up to a maximum of nine years, after which the Director General will grant an indefinite contract or terminate the fixed-term one. Article R II 6.03 of the Combined Staff Rules further states that a fixed-term contract shall expire at the end of the prescribed period and the Director General's decision whether or not to renew it shall be notified at least six months before expiry.

The procedure for granting indefinite contracts is set out in a memorandum the Director General issued on 21 October 1988. Proposals come from the Contract Advisory Committee, which follows the criteria set out under (a), (b) and (c) in 6 below.

The complainant, an Italian, joined the ESO at its headquarters at Garching, near Munich, on 1 October 1984 as an engineer/physicist on a fixed-term appointment for three years. He was assigned to the Telescope Engineering Department (TED) of the Very Large Telescope (VLT) Division. He had his appointment confirmed after probation and on 18 March 1987 had it extended by three years, from 1 October 1987 to 30 September 1990.

By a memorandum of 27 October 1989 the Director General, on the recommendation of the Contract Advisory Committee, decided not to grant him an indefinite appointment but to renew his contract for another three years, until 30 September 1993.

By a memorandum of 7 December 1989 the head of TED put him in charge of VLT's enclosures and buildings. By then he had reached grade 10.

Disappointed at still being refused an indefinite contract, he wrote to the Personnel Department and to the Director General on 28 March 1990 asking whether he would be paid termination and reinstatement indemnities if he left before the end of his new three-year appointment. By a letter of 29 March 1990 the Director General told him he would.

Because of reforms in VLT he was assigned at the end of 1991 to another group in TED but from there seconded to the Site and Building Group.

By a letter of 16 January 1992 he asked the Director General for formal transfer to the Site and Building Group and said he was willing to give up his full-time job if he might continue part-time work with the ESO. Although the leader of the Site and Building Group endorsed that proposal in a memorandum of 16 December 1991 to the head of VLT, the Director General did not act on it.

In a memorandum of 24 November 1992 to the head of VLT the complainant said that pending written notice to

the contrary and "the formal signature of the contract" he would consider himself "in charge of the technical responsibility of the development of the VLT Enclosures".

The head of VLT informed him in a memorandum of 4 December 1992 that since he had said about a year earlier that he would be leaving someone else had been put in charge.

By a letter of 18 December to the Director General the complainant challenged the decision to relieve him of that duty. In a reply of 5 January 1993 the head of Administration said that since the decision had not come from the Director General his letter could not be treated as an internal appeal.

In a letter of 19 January to the Director General he said he wanted to have his "general situation ... clarified". In a memorandum of 28 January 1993 the Director General asked the head of Personnel how to proceed to end the complainant's appointment.

In a document addressed on 8 February to the Contract Advisory Committee the head of VLT recommended giving him neither an indefinite contract nor an extension nor part-time work.

In its report of 1 March 1993 the Committee advised the Director General not to grant him an indefinite contract but just to let his appointment expire at 30 September 1993.

By a letter of 25 March 1993 the head of Personnel informed him of the Director General's decision to endorse that recommendation.

By a memorandum of 29 March to the Personnel Department one of the complainant's supervisors, who had sat on the Committee, expressed reservations about the recommendation and suggested letting him have "a prolongation in whatever form".

By a letter of 19 April the complainant asked the head of Personnel to give the reasons for the decision of 25 March. The head of Personnel replied on 28 April that the reasons were that there was no long-term structured requirement for his post and his performance was unsatisfactory and that under Article IV 1.02 of the Combined Staff Rules no internal appeal lay against non-renewal.

The letter of 25 March 1993 is the impugned decision.

B. The complainant has three pleas.

First, he alleges that the head of VLT was prejudiced against him. Annoyed by the complainant's critical remarks about VLT, the head of VLT had whittled down his responsibilities so as to get rid of him. It was plain - for example from the memorandum of 28 January 1993 - that the Director General intended, even before the procedure for granting indefinite appointments had begun, to put an end to his appointment. Since the impugned decision was taken at the instigation of the head of VLT it is flawed with abuse of authority.

His second plea is misappraisal of the facts. The argument that there was no long-term structured requirement for his post rests solely on the head of VLT's efforts to strip him of responsibility. The ESO is to create 34 posts, including several in the very field it recognised him to be qualified for. Yet even if the reason were true the Director General ought to have applied the provisions on abolition of post in Article R II 6.11 of the Regulations and looked at the opportunities for transfer.

It is untrue that his performance was unsatisfactory: in nine years with the ESO he never drew a single reproach.

Thirdly, he submits that the procedure for granting indefinite appointments was flawed by the frequent participation of the head of VLT, who himself put the recommendation to the Director General instead of offering a written opinion and who took part in the Advisory Committee's meeting. He exerted undue influence.

The complainant asks the Tribunal to quash the Director General's decision of 25 March 1993 and make him awards of damages equivalent to two year's salary, indemnities and allowances and of costs.

C. The ESO replies that the complaint is devoid of merit.

In declining to give the complainant an indefinite appointment the Director General exercised his discretion in the Observatory's interests and strictly complied with the material rules, particularly Article R II 1.17 of the Regulations.

The decision of 25 March 1993 was based on proper appraisal of the facts. From the start the complainant's appointment was linked to the specific task of helping to develop and work out a design for building the VLT enclosures. He seems to have come independently to the view that there was no long-term need for his services, since he stated in his letter of 16 January 1992 to the Director General that he had completed "a whole phase of activities" he had started in 1984. Moreover, at the end of his second appointment the Advisory Committee noted that his management skills were not entirely satisfactory and that he had become less keen.

In the ESO's submission there was no personal prejudice against him. The head of VLT was merely discharging his responsibility as the official in charge of the complainant's post after the complainant had announced he would be going.

The impugned decision shows no procedural flaws. It was only natural that the Director General should ask the Division leader to say whether someone working under him should get an indefinite appointment. The complainant's charge of bias against the Advisory Committee is merely speculative. The opinion the Director General expressed in the memorandum of 28 January 1993 did not prejudice the final decision.

D. In his rejoinder the complainant asserts that in his letters of 28 March 1990 he was merely enquiring what his entitlements would be if he resigned; he had no intention of leaving, particularly as his assignment to the System Engineering Group in January 1991 gave him full job satisfaction. Only after the head of VLT took away his responsibilities did he contemplate part-time work. He presses his pleas and maintains in particular that his supervisors overlooked essential facts in the procedure for awarding indefinite appointments.

E. In its surrejoinder the Organisation presses all its pleas. It submits that the head of VLT was best fitted to define the needs of his Division, and that his taking part in the procedure did not make it unlawful. Besides, the Advisory Committee too considered that the complainant should not be given an indefinite appointment. His saying several times that he intended to leave in no way swayed the Director General's decision.

CONSIDERATIONS:

1. The complainant, who is a physicist and engineer, is challenging the ESO's refusal to grant him a contract of indefinite duration on the expiry of his last fixed-term contract, on 30 September 1993.

2. The Observatory recruited him on 1 October 1984 under a contract for three years. His original duties related to the "study phase" of installing a Very Large Telescope (VLT) in Chile or, to be more precise, the "study and analysis of the technical concept for the VLT enclosures". He had his contract twice renewed, each time for three years, up to the maximum period of nine years allowed under the Staff Regulations for fixed-term appointments. Once the maximum had been reached the Director General had to choose between granting him a contract of indefinite duration and terminating his appointment.

3. The Director General opted for termination and so informed him on 25 March 1993, i.e. six months before the expiry of his appointment, that he was not to get a contract of indefinite duration.

4. The complainant seeks the quashing of that decision and damages equivalent to two years' pay. He has two main pleas. The first is abuse of authority in that the impugned decision was not prompted by the Observatory's interests, and the other plea is that there was breach of the material rules of form and of procedure.

5. Before taking up those pleas the Tribunal will set out the material provisions. Article R II 1.17 of the ESO Staff Regulations reads:

"Staff members shall receive on appointment a fixed-term contract of not more than 3 years' duration. This contract may be renewed or extended once or more often to cover a maximum period of not more than 9 years. After this period of 9 years, the Director General will grant an indefinite contract, or the contract will be terminated."

And Article R II 6.03 of the Regulations states: "A fixed-term contract shall expire at the end of the prescribed period. The Director General may renew it or not; his decision shall be notified to the member of the personnel at

least 6 months before the date of expiry, if the contract is of sufficient duration. ..."

6. For the grant of indefinite contracts the Director General has laid down a procedure in a memorandum he issued on 21 October 1988. The memorandum sets out the following rules. Any decision by the Director General on the grant of an indefinite contract must follow consultation of the group leader, the management team and a Contract Advisory Committee. The Committee is the main feature of the new rules. It is to consist in each case of four members: the official's first-level supervisor; a staff member named by the Director General who must be at least equal in grade to the official; a representative of the Staff Association; and a representative of the Administration who serves as convenor. The memorandum defines as follows the criteria that those consulted are to bear in mind:

"(a) There is a long-term structured requirement for the position concerned.

(b) The staff member concerned has fully met the requirements of the post he/she is occupying at the time of the review and he/she has the necessary profile and aptitudes to further advance in his/her career within his/her specialisation or in other related fields.

(c) The staff member's performance warrants an indefinite appointment."

The alleged abuse of authority

7. The complainant contends that the decision not to convert his fixed-term appointment into an indefinite one was taken on the strength not of the Observatory's interests but of several subjective factors: the uncertainty of his administrative status due to his secondment from one unit to another; the hostility of the head of VLT, who was irritated at critical but constructive remarks he had made about the development of the project; and the bad appraisal of his services and his fitness for service over the long term.

8. In answer the Observatory offers two main pleas. First, it points out that the complainant is a physicist rather than an engineer and that his skills, though suited to the requirements of preparatory work on the Very Large Telescope, would over the long term have become much less useful once the preparatory stage was over and there began the stage of execution, which calls for other skills.

9. Secondly, the Observatory is fairly critical of the complainant's past services. Though he made a promising start, it says his performance slackened, he proved unable to adapt to the shifting requirements of successive assignments, he did not get on well with others and he was careless in following up contracts subject to his control.

10. The case law states the principles that govern this dispute between an organisation and a staff member who - it does not deny - shows some merit. The complainant himself refers to Judgments 588 (in re Ido), 600 (in re Freeman), 892 (in re Riseley) and 1037 (in re Baudet), and a more recent reaffirmation of the principles is in Judgment 1317 (in re Amira), in particular in 24.

11. The case law shows 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. The exercise of such discretion is subject to review, but only to limited review, the Tribunal respecting the organisation's freedom to determine its own requirements and the career prospects of staff.

12. When seen in that light the complainant's objections appear quite devoid of merit. It is plain on the evidence that the impugned decision was fully warranted by the Observatory's objective interests as demonstrated on cogent grounds. In view of those interests the decision not to grant the complainant an indefinite appointment may not be attributed to any personal hostility towards him or to any other circumstance of a personal kind.

13. As for the appraisal of his services, the evidence shows that the Observatory by no means overlooked his accomplishments as a physicist in his own special field. Its qualified position makes it all the easier to accept its opinion of his services, which was on the whole unfavourable. One salient point is the requirement in the memorandum of 21 October 1988 that any applicant for an indefinite appointment should "fully" meet the requirements of the post he held under a fixed-term one. Unless there is a glaring error the Tribunal will not interfere with the assessment.

14. One last remark is that professional shortcomings are a typical justification for straightforward separation on expiry of a temporary appointment: the Tribunal ruled on cases fairly similar to this one in Judgments 1038 (in re

Duguet), 1128 (in re Williams), 1262 (in re Scherer-Saavedra) and 1273 (in re Oïga).

The alleged breach of due administrative process

15. The complainant contends that the ESO failed to observe due administrative process in his case. The gist of his criticisms is the following.

A memorandum of 28 January 1993 reveals that before the proceedings began the Director General and the head of VLT had already been planning together not to renew his appointment.

The Contract Advisory Committee was not properly constituted. One member was the head of VLT, who was already prejudiced against him, and another was the leader of a group to which he had had only a fictitious transfer.

The ESO took no account of the reservations expressed by two of the Committee's members.

16. His objections must be viewed in the context of due administrative process and, more specifically, the guidelines in the memorandum of 21 October 1988.

17. Though the memorandum of 28 January 1993 does express the intention of the Director General and the head of VLT not to continue his appointment, it also betokens their attachment to due process, in other words to honour the safeguards that officials derive from the procedural rules and the rating standards in the memorandum of 21 October 1988.

18. There was nothing improper about the membership of the Contract Advisory Committee in this case. Since the complainant belonged at the time to two administrative units it was only reasonable that both his first-level supervisors should sit on the Committee. That they did was in no way to his detriment since according to the Committee's minutes all the members were agreed on the main issue, which was whether to grant him an indefinite contract. As for the head of VLT, the minutes say that the Committee asked him to state his views and to rate the complainant's past performance. That was a perfectly proper means of informing the Committee.

19. Lastly, the reservations expressed by two members are irrelevant to the thrust of the decision, on which the Committee was unanimous; they were about the possibility of granting him a limited contract instead of the indefinite appointment he was being refused.

20. The conclusion is that, although from the outset the head of VLT and the Director General did not intend to continue the complainant's appointment, they did abide by the procedure set out in the memorandum of 21 October 1988. The complainant was kept informed throughout the proceedings of the ESO's intentions and the grounds for the action it was taking. As things turned out the Committee came to the same view as the head of VLT and the Director General about whether or not to grant him an indefinite appointment. So he may not properly object to any breach of due administrative process.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-

President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas
P. Pescatore

Michel Gentot
A.B. Gardner

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