

EIGHTY-SECOND SESSION

***In re* Echeverría Echeverría García Ramírez, Julien Urzúa and Tapia Rojas**

Judgment 1616

The Administrative Tribunal,

Considering the complaints filed by Mr. Owen Echeverría Echeverría, Mr. Roberto García Ramírez, Mr. Rubén Julien Urzúa and Miss Victoria Tapia Rojas against the European Southern Observatory (ESO) on 10 January 1996, the Observatory's single reply of 14 April, the complainant's rejoinder of 17 May and the ESO's surrejoinder of 23 July 1996;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants used to be members of the ESO's local staff in Chile. It recruited them between 1967 and 1977 for employment at its astronomic observatory at La Silla, in the Andes. Miss Tapia Rojas was in the Technical Research Support Department (TRS) at grade "A5+15". The other complainants were in Maintenance and Construction (M & C): Mr. Echeverría Echeverría was a "labourer" at grade "A2+15", Mr. García Ramírez an administrative assistant at "B1+9" and Mr. Julien Urzúa a site supervisor at "B1+17".

By letters of 15 September 1995 the ESO's Administrator in Chile told them that their posts were to be abolished at 16 September 1995 in the context of reforms to be made for budgetary reasons in the ESO's operations there and that their appointments were to end at 15 September 1995 under Articles LS II 5.03 and 5.04 10 of the Regulations for ESO Local Staff in Chile, viz. "for reasons determined by the functional necessities of the Organisation".

They claimed reinstatement but the Director of La Silla refused in letters he sent them on 26 and 31 October 1995. They appealed to the Director General. The acting head of Administration rejected their appeal on the Director General's behalf by letters dated 15 December 1995, observing that it was not "appropriate" to put their cases to a board under Article LS VI 1.08 of the Local Staff Regulations. Those are the decisions under challenge.

B. The complainants contend that the decisions they are impugning are unlawful. They plead procedural and substantive flaws. In their submission the ESO failed to observe its rules on notice, on assignment to other duty stations and on consultation of the Joint Advisory Appeals Board. They dispute the ESO's reasons for getting rid of them and contend that its treatment of them was arbitrary. Miss Tapia Rojas further pleads sexual discrimination.

Each of them seeks the quashing of the decision impugned and reinstatement as from 15 September 1995 or, failing that, damages on all counts in an amount equivalent to five times "total gross remuneration" for the period from 15 September 1994 to 15 September 1995, plus interest to be reckoned at the rate of 12 per cent a year from the date of filing the complaint. Mr. Julien Urzúa further claims the payment of service indemnity taking into account his "full" 28 years' service. They claim costs.

C. The ESO contends that the complaints are devoid of merit. It describes the changes that occurred in conditions at La Silla over the years and that made the complainants' services disposable. Although it was to have a new site elsewhere in the Chilean Andes, at Cerro Paranal, it had no work to offer them there either. It denies committing any procedural mistakes and says that the complainants have misread the material rules.

D. In their rejoinder the complainants rebut the Observatory's reply, enlarge on their pleas and press their claims.

E. In its surrejoinder the Observatory maintains that the impugned decisions show none of the procedural or substantive flaws the complainants plead.

CONSIDERATIONS

1. The complainants used to hold permanent appointments with the ESO as local staff at its astronomic observatory at La Silla, in Chile. On 15 September 1995 they each got letters announcing the immediate abolition of their posts and the consequent termination of their appointments under Article LS II 5.04 of the Regulations for ESO Local Staff in Chile, which allows termination owing to the "functional necessities of the Organisation". They lodged appeals first with the Director of La Silla and then with the Director General. But letters dated 15 December 1995 told them that the Director General had rejected their appeals. Those are the decisions they are impugning.

2. Their complaints raise similar issues and so may be joined to form the subject of a single judgment.

3. The complainants put forward one plea on the merits and three on issues of procedure. On the merits they submit that their dismissal was unlawful on the grounds that the abolition of their posts was in breach of contract and there was no "functional necessity" to replace permanent with part-time or short-term staff. Their procedural objections are breach of the rules on notice, breach of the ESO's duty to try to reassign staff on posts that are to be abolished, and breach of the Director General's duty to consult the Joint Advisory Appeals Board before deciding on an appeal.

4. The Tribunal need not rule on the merits since it upholds some of the procedural objections.

5. It is satisfied on the evidence and from the wording of the decisions of 15 September 1995 that, indefinite appointments notwithstanding, the complainants were dismissed without notice. The letters informing them of termination said that the Observatory was abolishing their posts on the morrow and so ending their contracts on 15 September, the very date that the letters bore. Though the ESO was to let them have a month's pay in lieu of the notice due under Article LS II 5.03, that did not meet the requirement of notice. The mere remittance of pay does not meet that requirement unless the parties to the contract of service agree that the employee should not work out the period of notice or the organisation puts him on special leave during that period. Failing those exceptions the employee must be given actual notice so that he may make proper arrangements for leaving and possibly look for another job. It is inadmissible that any official, let alone an established one, should be told of dismissal on the very day on which it takes effect and left to his own devices without further ado. There is no doubt some merit in the Observatory's statement that the complainants had for long been aware of the threat that the reforms planned at La Silla posed to their own jobs. But it is not admissible in law that they should be denied the month's notice the rules required, even though, as has been said, they were paid in lieu.

6. A further flaw in the impugned decisions is that they did not follow the referral to the Joint Board that Article VI 1.03 of the ESO's Combined Staff Rules requires. That provision says:

"... appeal shall be made first to the Director General, who, before taking any decision on its substance, shall consult a Joint Board whose composition shall be defined in the Regulations."

The defendant does plead on that score that the Local Staff Regulations, which the Director General issued under Articles I 1.03 and I 1.04 of the Combined Staff Rules, differ from the rules that apply to international staff in that they merely empower, and do not require, him to set up an advisory board to report on claims and appeals by local staff. The ESO argues that in deciding not to consult a board -- or apparently even to set one up -- the Director General was exercising the discretion that an earlier judgment of the Tribunal's acknowledged he had. But the plea does not hold water. The provisions of the Combined Rules apply to international and local staff alike, and so any provision that applies to one category of staff and not to the other offends against those Rules and is unlawful. Here the Director General had no authority to treat as a mere option the consultation of the joint board on appeals from local staff: the Combined Rules apply to all staff and so does the duty those Rules lay down. The rule under which the Director General exercised discretion was an unlawful one and he thereby committed a mistake of law. Again the complainants' plea succeeds. The reason why the Tribunal came to another conclusion in Judgment 872 (*in re Yagnam Vigorena*) is, as it said in that text, that there the complainant had not pleaded the unlawfulness of the local rule.

7. There is therefore no need to take up the complainants' plea that, having abolished their posts, the Observatory

failed in its duty to try to find other suitable jobs for them. That is just one of the issues that the joint board would have entertained had it ever met.

8. The conclusion is that the ESO failed to observe the proper procedure, that the impugned decisions of 15 December 1995 cannot stand and that the cases must be sent back for due decisions on the appeals. The complainants are, however, entitled, not to the reinstatement they claim, but merely to review of their status. They are further entitled to awards of damages in amounts equivalent to what they would have earned from 15 September 1995 up to the dates at which decisions are duly taken on their appeals, less any indemnities the ESO may already have paid them.

9. For Mr. Julien Urzúa, who reached the age of retirement on 20 September 1996, the amount of damages shall be equivalent to what he would have earned up to that date. Moreover, there is no merit in his claim to further terminal entitlements on the strength of the contract that he signed in 1967 and that was governed by the law of Chile: the applicable law under the terms of his appointment as amended in 1972 is the ESO's own rules, and those are the rules that have been applied to him.

10. The complainants are entitled to costs. The amount is set at 1,000 United States dollars for each of them.

DECISION

For the above reasons,

1. The Director General's decisions dated 15 December 1995 and those of 15 September 1995 on the cases of the four complainants are set aside.
2. The cases are sent back to the Director General for due decisions on the appeals.
3. The Observatory shall pay them the awards as set out in 8 and 9 above.
4. It shall pay each of them 1,000 dollars in costs.
5. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner