Registry's translation, the French text alone being authoritative.

EIGHTY-FIFTH SESSION

***In re* Kowasch**

Judgment 1734

The Administrative Tribunal,

Considering the complaint filed by Mr. Wolfgang Kowasch against the European Southern Observatory (ESO) on 30 April 1997 and corrected on 13 August, the ESO's reply of 21 October 1997, the complainant's rejoinder of 9 March 1998 and the Organisation's surrejoinder of 14 April 1998;

Considering Articles II, paragraph 5, VII and X, paragraph 1(c), of the Statute of the Tribunal and Articles 4, paragraphs 1 and 2, and 16 of its Rules;

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. The complainant, a German citizen who was born in 1948, is a mechanical engineer. He joined the ESO on 1 July 1994 under a fixed-term appointment for three years as a civil engineer at grade 9. He was assigned as such to the VLT (Very Large Telescope) project in Chile.

In a report on his performance in 1995 his first-level supervisor said "His overall performance is satisfactory and only occasional improvements are needed". The appraisal of his performance in 1996 was much the same.

On 5 December 1996 his supervisor gave him a letter dated 30 October 1996 and signed by the VLT project manager and the head of Personnel. It informed him that his appointment would not be renewed. In a letter of 6 December to the head of Administration he enclosed by way of acknowledgement a copy of the letter of 30 October which he had dated 6 December and signed. He asked the head of Administration to confirm his supervisor's statement that his appointment was to be ended not on professional grounds but because the work of the VLT Site and Building Group would be over in 1997. Lastly, he wanted to have a copy of his personal file sent to his home address in Chile. On 3 January 1997 the head of Personnel answered that, "for reasons of confidentiality, a complete copy of your Personal File cannot be conveyed to you" and that "concerning the reasons for terminating your contract, I shall be able to give you an answer after discussion with your direct supervisor".

On 28 January 1997 the complainant sent the Director General a fax challenging the decision in the letter of 30 October 1996. In a further fax of 30 January he set out the ten grounds of his appeal. The head of Administration replied in a letter of 3 February 1997 that his appeal of 28 January was irreceivable: though he had got the letter of 30 October on 6 (*recte* 5) December 1996 he failed to challenge it within sixty days, as Article R VI 1.05 of the Staff Regulations required; and in any case Article VI 1.02 is of the Staff Rules said "There shall ... be no appeal against any decision ... not to renew or extend a contract". That is the decision he is impugning.

In a letter of 10 February 1997 a personnel officer proposed amending his contract to put him on special paid leave from 8 January until 30 June 1997, when his contract ended, instead of compensating him for overtime done and leave accrued since 1994; he would be relieved of duty during that period. On the same day he agreed on condition that the starting date was changed from 8 to 22 January. The Administration agreed.

B. The complainant contends that the complaint is receivable *ratione temporis*: since he did not get the letter of 30 October 1996 until 5 December, his appeal of 28 January 1997 was lodged within the sixty days prescribed by Article R VI 1.05 of the Staff Regulations. It is also receivable *ratione materiae*: according to Judgment 474 (*in re* Gale), a provision like Article VI 1.02 not binding on the Tribunal, which will itself determine whether a complaint is receivable.

On the merits the complainant's first plea is that the Observatory was in breach of its duty to give him the real reasons for not renewing his appointment. Both the original decision and the one rejecting his appeal ignore the merits and simply cite the rules on termination.

Secondly, the impugned decision disregards the complainant's rightful expectations. The ESO broke its promise of stable employment. Although his supervisor made critical comments in his performance reports, none was about the quality of his work. He maintains that the ESO still needs his services.

Thirdly, he pleads abuse of authority: at his supervisor's request the Organisation took on a consultant to do most of his work.

He asks the Tribunal to quash the decision of 3 February 1997 and award him costs.

C. In its reply the Organisation submits that the complaint is irreceivable. Article VI 1.02 of the Staff Rules precludes internal appeal against non-renewal of appointment. In this case the decision was taken on 30 October 1996, and it was final. The complainant having acknowledged receipt of it on 6 December, that is the starting date of the time limit of ninety days in Article VII, paragraph 2, of the Tribunal's Statute. The complaint was not lodged until 30 April 1997 and is therefore out of time. As to the letter of 3 February 1997, it merely told the complainant that his internal appeal was irreceivable.

D. In his rejoinder the complainant submits that the Organisation's objections to receivability just go to show what it thinks of appeals: a staff member is barred not only from lodging an internal appeal against non-renewal but from asking the Director General to reconsider an adverse decision. In effect the ESO's practice denies the right of appeal to anyone unfamiliar with the niceties of procedure. The Organisation's bald statement of 3 February 1997 that no appeal lay against the decision of 30 October 1996 set a "procedural trap".

E. In its surrejoinder the ESO explains that the Staff Rules allow the staff member, before going to the Tribunal, to appeal to the Director General against any sort of decision but three, which are inherently final: termination of a probationary appointment, non-renewal or extension, and dismissal for some reason to do with the performance of duty. To apply the Staff Rules and Regulations in a particular case was no "procedural trap". The rules do not prevent someone from asking the Director General to reconsider one of the three sorts of "inherently final" decision. But someone who does so must observe the time limit for appeal to the Tribunal.

The amendment to the complainant's contract, which he signed on 10 February 1997, strongly suggests that at the time he had consented to the decision of 30 October 1996.

CONSIDERATIONS

1. The complainant, a German who was born on 18 January 1948, was appointed under a contract of 6 May 1994 to work for the ESO as a civil engineer for three years, from 1 July 1994 to 30 June 1997. His duty station was its site at Cerro Paranal in Chile.

By a letter of 30 October 1996 the Administration told him on the Director General's behalf that his appointment would not be renewed and that the letter gave him the notice required by Article R II 6.03 of the Staff Regulations. It explained some arrangements to be made, but not the reason for non-renewal. He says that he got the letter on 5 December 1996.

In a letter of 6 December 1996, which the ESO says it received on the 23rd, he acknowledged receipt of the letter of 30 October. He asked for confirmation that the reason for non-renewal was the end of construction work and he asked for a copy of his personal file. Those matters came up in later correspondence, and so did his entitlements to compensation for leave and overtime, on which the parties reached agreement. On 3 February 1997 he was told that he would get no increment in 1997, his performance being not quite up to expectations.

By a fax message of 28 January 1997 he told the Director General that he was appealing against the decision on grounds that he would state separately.

He did so in another such message of 30 January 1997, the gist of which was that he had been promised a long-term appointment, he had provided the services required of him and the ESO still needed him.

In a letter of 3 February 1997 the head of Administration replied on the Director General's behalf. He told the complainant that, though notice of appeal had come on 29 January, the appeal was irreceivable for two reasons:

first, he had got the decision of 30 October 1996 on 6 (*recte* 5) December 1996 and had failed to challenge it within the time limit of sixty days in Article R VI 1.05 of the Staff Regulations; secondly under Article VI 1.02 of the Staff Rules no appeal lay against non-renewal.

The complainant filed his complaint on 30 April 1997. He is asking the Tribunal to "quash the Director General's decision not to renew his appointment, as notified to him by the letter of 3 February 1997 from the head of Administration, and to grant him redress".

The ESO asks the Tribunal to declare the complaint irreceivable.

The material pleas are set out below.

2. According to Article VII(2) of the Tribunal's Statute, to be receivable a complaint must be filed no more than ninety days after the impugned decision was notified to the complainant.

The decision challengeable under VII(2) is the final one taken by the Organisation: see Judgments 305 (*in re* Guyon and Nicolas), 474 (*in re* Gale), 873 (*in re* Da) and 1082 (*in re* Liégeois).

(a) The decision of 3 February 1997 relates only to the receivability of the internal appeal. The Organisation has not argued before the Tribunal that that appeal was out of time, but the decision relies also on Article VI 1.02 of the Staff Rules, which bars appeal against non-renewal. The upshot is that the final substantive decision was the one, notified to the complainant on 5 December 1996, not to renew his appointment.

(b) As the precedents cited above make plain, he should have come to the Tribunal within ninety days of that date. And since he did not do so, his complaint is *prima facie* time-barred.

3. The complainant puts forward several pleas which, in his submission, show his complaint to be receivable.

The observance of time limits is not an empty formality but essential to sound management. Only in exceptional cases may they be waived, namely when to demand strict compliance would cause a flagrant miscarriage of justice and good faith must instead prevail. Of course the rules of good faith apply to organisation and employee alike. It would be in bad faith for the organisation to make a staff member bear the consequences of any obscurity in the rules or in its dealings with him. Thus the Tribunal has often ruled that time limits and other procedural requirements should not set traps: see Judgments 522 (*in re* Nielsen), 607 (*in re* Verron), 873 (*in re* Da), 1247 (*in re* Kurukulanatha), 1317 (*in re* Amira), 1376 (*in re* Mussnig) and 1502 (*in re* Baillon). Likewise, good faith requires the staff member to pay due heed to the organisation's rules on such matters as dispute procedures. Written rules are there to be consulted and, if need be, the staff member may seek help from colleagues, from a staff association or from counsel in understanding them.

(a) The complainant finds the rules unclear and advocates so construing them as to make his complaint receivable.

He is mistaken. VI 1.02 is quite plain. An internal appeal being ruled out, he should have thought of filing a complaint against non-renewal. If he could not understand the article on his own, he was free to get advice.

(b) In his submission the time limit did not start when he got the original decision because no reasons were given for it: he was free to wait until he got the reasons.

Even a decision that is formally flawed may be challenged and, failing that, become final. Besides, failure to provide reasons is a flaw which may be put right later.

It was not so that he could file suit that the complainant asked the Organisation to explain the reasons for its decision. He was, after all, well aware of the reasons from his performance reports, and indeed managed to argue his internal appeal. What he wanted the Organisation to say was that the reason for non-renewal was the completion of the work he had been recruited to do. And it was in order to safeguard his career that he wanted such a statement.

The conclusion is that there is no need to determine whether, or in what exceptional cases, a staff member may be free to hold over the filing of an appeal until he knows the reasons for the decision he wants to challenge.

(c) The complainant cites Judgment 1082: though no appeal lay, the competent body agreed to hear the case; and the Tribunal held that the ensuing decision was a final and challengeable one. The complainant pleads that he was allowed to make an internal appeal.

He is mistaken. He had no right to lodge an internal appeal and, since the appeal body did not take up his case, the final decision was the one notified to him on 5 December 1996. There was nothing illogical or odd about that.

(d) The complainant cites Judgment 1247. There the Tribunal held that the time limit did not start while the parties were still seeking settlement but that there was a challengeable decision as soon as the organisation made it clear it was not going to change its mind. In the complainant's submission that ruling helps his own case since the parties continued discussion even after 5 December 1996, when he got the Observatory's letter of 30 October 1996.

He is not in like case. The letter notified a decision, the Observatory never agreed to go back on it, and discussion between the parties was on mere incidentals such as compensation for overtime work and accrued leave.

(e) The gist of the complainant's argument is that, even if his internal appeal was not receivable, his complaint to the Tribunal is; that since he plainly wanted to challenge the decision on the merits the ESO should have deemed his internal appeal receivable by treating it as an appeal to a body that did have competence, namely the Tribunal itself; in that case, even though lodged with the wrong body, it could still be regarded as a complaint lodged in time with the Tribunal. Indeed the ESO could, if need be, have forwarded it to the Tribunal.

Such a reading favours a complainant because it spares him the consequences of his own mistake. But it is not borne out by the terms of the Tribunal's Statute and Rules. According to Article X(1)(c) of the Statute the Rules set out the provisions to be followed in filing complaints. Article 4(1) of the Rules says that a complaint shall be addressed to the "President through the Registrar"; and Article 4(2) reads:

"... the Tribunal shall take into account the date of deposit of the complaint at the Registry or the date of despatch, provided that in the event of doubt about the date of despatch it shall take into account the date of receipt at the Registry."

Nothing is said of observing the time limit by filing with the wrong body.

Article 16 does say that "The Tribunal shall ... deal with any matter which these Rules do not expressly provide for"; so the Tribunal might still deal with an issue not expressly provided for if it needed to do so.

But there is no need for precedent to supplement the texts as the complainant suggests. As they are the rules are clear and easier to apply than his hypothesis would be. Besides, as was said above, a staff member may be expected to know the terms of his employment and in particular the body competent to hear his appeal. As was held in Judgment 1141 (*in re* Tomson), under 18: "... every official may be expected to know the requirements of the Staff Regulations and Staff Rules, wherever he may be stationed or resident";. Though not to be read out of context, that sentence does embody a basic principle: care may be expected of the staff member in finding out what the rules say and in abiding by them. There is not much risk of error and proper diligence will avoid what little there is.

In sum, lodging an appeal with a incompetent internal body within the time limit in the Statute is not tantamount to filing a timely complaint with the Tribunal.

(f) The complainant pleads that an organisation owes a duty to its staff not to expose them to unnecessary risk; so - he asks - should not the text of any administrative decision say what the means of redress may be?

As he observes, not every organisation has such a rule. Nor does the Tribunal's Statute require that the impugned decision include such advice. Again there is no lacuna that the case law need remedy, and there is no general principle of the law of the international civil service that requires guidance on the means of redress.

Besides, the lack of such guidance was hardly to the complainant's detriment: he was told, before the time limit for a complaint to the Tribunal had expired, that no internal appeal would lie. He should have realised that the decision

he must challenge in a complaint to the Tribunal was the final substantive one he had received.

(g) Relying on the same precept as in (f) above, he argues that the Organisation ought to have warned him as soon as it realised he had misunderstood.

An organisation does have a duty to spare the staff member unnecessary injury and, if it sees a blatant procedural mistake, must, if possible, alert him to it.

But the ESO did so as soon as it realised that the complainant's internal appeal was irreceivable. It thereby gave him ample time in which to go to the competent body, the Tribunal.

True, it did not tell him in so many words that what he must challenge was, not the declaration that his appeal was irreceivable, but the substantive decision, and that the time limit had begun when he had got notice of that decision. But at the time it had no reason to suppose that he had made a mistake which it should point out to him. It stood to reason that, if complaint there could be, it must challenge the substantive decision and that the time limit had started at the date of notification. On that score the ESO was not remiss.

The conclusion is that none of the complainant's pleas can succeed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner

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