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

EIGHTY-FIFTH SESSION

In re Dierckx (Nos. 1 and 2)

Judgment 1746

The Administrative Tribunal,

Considering the complaint filed by Mr. Peter Dierckx against the European Southern Observatory (ESO) on 17 June 1996 and corrected on 26 September, the ESO's reply of 16 December 1996, the complainant's rejoinder of 26 February 1997 and the Observatory's surrejoinder of 11 April 1997;

Considering the second complaint that Mr. Dierckx filed against the Observatory on 18 December 1996 and corrected on 24 March 1997, the ESO's reply of 30 June, the complainant's rejoinder of 14 October 1997 and the Observatory's surrejoinder of 14 January 1998;

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

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 Belgian who was born in 1958, joined the staff of the ESO on 18 September 1989 under a three-year fixed-term appointment as a systems engineer. He was assigned to the Data Management Division at the ESO's headquarters in Garching, near Munich. He twice had his appointment extended by 18 months. On 13 November 1994, before the second extension was to expire, the Observatory offered him an indefinite appointment and he accepted.

Facts relevant to this case are set out, under A, in Judgment 1745 (*in re* de Roos), also delivered this day. By a letter of 6 December 1995 the head of the Personnel Department informed the complainant that because of a plan to "outsource" - i.e. subcontract - work on information technology the Observatory was to abolish several posts in the Division, including his own; since it had no other post to offer him it would be ending his appointment under Article R II 6.01(h) of the Staff Regulations after the period of seven months' notice required in Article R II 6.13.

On 1 July 1991 the ESO replaced the Staff Regulations that had been in force since 1 July 1983. The new version amended the system of indemnities payable for termination on abolition of post. On 22 January 1992 the head of Administration issued a circular setting out the ESO's position on acquired rights - including end-of-service entitlements - and announced that current contracts would, until expiry, come under the 1983 Regulations provided the new ones were not more favourable to the staff member. On 11 December 1995 Personnel Services sent the complainant a statement of his end-of-service entitlements. Under the new Regulations he was entitled to five-and-a-half months' basic salary and under the old ones - in the defendant's unchallenged submission - to 11 months' salary.

On 22 December 1995 he asked the head of Personnel to explain how the ESO had reckoned the amount. By a letter of 2 January 1996 the head of Personnel replied that, having got his indefinite contract on 13 November 1994, he came under the rules in Annex R A 11.03 to the 1991 Regulations, which had served as the basis for the reckoning; the circular of 22 January 1992 did not apply because he had not had an indefinite appointment while the 1983 Regulations were still in force. Having got such an appointment in 1994, he was no longer under an extended fixed-term one, as he had to be for the circular to apply.

By a memorandum of 30 January 1996 to the Director General he made a first appeal against termination of his appointment on the grounds that the decision, mistakenly said to be in the ESO's interests, was unlawful

and the Observatory had failed to discharge its duty to put him on another post.

By a memorandum of 21 February 1996 he appealed to the Director General against the decision of 2 January 1996 about the amount of his end-of-service entitlements and applied for leave to go straight to the Tribunal.

By a letter of 13 March the chairman of the Joint Advisory Appeals Board told him that the Director General had put to the Board his first appeal about the ending of his appointment.

By a letter of 21 March 1996, the decision he is impugning in his first complaint, the acting head of Administration told him that the Director General gave him leave to put the matter of end-of-service entitlements directly to the Tribunal.

In its report of 24 July the Board held that the abolition of his post had been due not to "outsourcing" but to a "ceiling" that the ESO's Council had set on the number of international staff. Though it reserved the issue of the lawfulness of outsourcing, it did recommend reinstating the complainant or else paying him the amount he had claimed. The Director General sent him the report under cover of a letter of 19 September 1996 upholding the decision of 6 December 1995. That is the decision he is challenging in his second complaint.

B. In his first complaint he submits that the ESO should have applied the circular of 22 January 1992 because he was indisputably its employee at the time and the grant of his indefinite appointment in 1994 did not extinguish the benefit of any term of his earlier contracts. Many precedents affirm the notion known as *patere legem*: the ESO must abide by its own rules until it amends or repeals them. So, in his view, it ought to have reckoned his entitlements in line with the 1983 Regulations. In any event the circular of 22 January 1992 made a promise that bound it.

Subsidiarily, he contends that the grant of end-of-service entitlements is one of the fundamental terms of employment that will have induced the official to accept the offer of employment. So both the grant of them and the amount are acquired rights.

In his first complaint he asks the Tribunal to set aside the decision in the Director General's letter of 21 March 1996 insofar as it refuses him the full amount of his end-of-service entitlements and to afford him whatever redress is due. He claims costs.

He puts forward six pleas in support of his second complaint.

The first is that the Observatory acted in breach of Article R VII 1.02 of the Staff Regulations, which says:

"The Director General shall consult the [Standing Advisory] Committee and receive its recommendations on general questions concerning the personnel including the contents and application of the Combined Staff Rules and the present Regulations."

Although outsourcing and the consequent abolition of posts were obviously "general questions concerning the personnel", the ESO never consulted its Advisory Committee.

Secondly, it broke an oral promise made to him by the acting head of the Division on 29 March 1995 that outsourcing would not mean abolishing any posts.

Thirdly, it failed to tell him the real reason for abolishing his post. It made out that it would be saving money by the outsourcing, but it has not. The real reason for abolition was that it wanted to hold the number of staff at a particular figure.

His fourth plea is that it did not try to find him another post on its own staff, although it could have done and indeed was required to do so by Article R II 6.11 of the Regulations.

Fifthly, since outsourcing was not in its interests, abolition of his post was an abuse of authority.

Lastly, it caused him unnecessary and undue injury because it need not have abolished his post at all.

In his second complaint he seeks the quashing of the Director General's decision of 19 September 1996 and an award in costs.

C. In its reply to his first complaint the ESO says that his end-of-service entitlements are governed by the 1991 version of the Staff Regulations, which was in force on 13 November 1994 when he got his indefinite appointment. He is mistaken in saying that it was an extension of his original one.

The circular of 22 January 1992 meant that anyone serving under a fixed-term contract at 1 July 1991 was to continue to enjoy any favourable terms of the 1983 version of the Regulations until the contract was renewed. Someone who got a permanent appointment after 1 July 1991 forfeited that right and the new Regulations applied.

The ESO does not deny that the grant of end-of-service entitlements is ordinarily a basic term of employment and amounts to an acquired right that it has a duty to safeguard. But the complainant must have realised that his indefinite appointment came under the 1991 Regulations and that the provisions of the 1983 ones on end-of-service entitlements would not apply. Since he consented to the application of the new rules the question of breach of acquired rights cannot arise.

In its reply to his second complaint the Observatory argues that in deciding to subcontract some work on information technology that was not among its main tasks, the Director General was exercising the authority vested in him by Article VI of its founding Convention. It has already contracted out several services, many of them at Garching. Consistent precedent has it that an international organisation may carry out internal reforms at its own discretion. Likewise, determining whether outsourcing will save money is a management decision that it is up to the Director General to take.

The Observatory contends that outsourcing is not a "general question concerning staff" within the meaning of Article R VII 1.02 but a matter of "operation policy". It was not originally intended to reduce staff. In any event the Director General was not bound to consult the Standing Advisory Committee about the decision to abolish the complainant's post. Consulting the Committee is an "imperfect obligation" since the rules prescribe no penalty for failure to discharge it. So such failure does not make any subsequent decision null and void. Besides, the Director General did consult the Committee on some features of outsourcing. The oral statement by the acting head of the Division was a general one and was not binding on the Observatory, the less so since it was about the situation then prevailing. The complainant is wrong in saying he was not told of the real reasons for abolishing his post: he mistakenly assumes that the main purpose of outsourcing was to save money. In fact there were more important reasons of which he was well aware: the ESO needed the services of a firm expert in a fast-developing field of technology and it had to keep the number of staff from rising. The Department of Personnel did try, as the Director General asked, to find him another post, but to no avail.

D. In the rejoinder on his first complaint the complainant points out that the ESO's argument means treating permanent staff less well than officials who have had fixed-term appointments extended several times. The relationship between employer and employee must surely mean that the fundamental terms of the original contract survive any later extension: for an acquired right to be extinguished on such extension would be at odds with the whole doctrine.

In his rejoinder on his second complaint he points out the ESO's omission to challenge his contention that subcontracting saved it no money, although in the internal appeal proceedings it kept citing financial reasons both for that policy and for the abolition of his post. So outsourcing was just a way of keeping to the "ceiling" set by the Council on the number of staff.

E. In its surrejoinder on his first complaint the ESO says that if the complainant were right it could never in effect amend its staff rules so as to confine the application of new provisions to those recruited after they came into force.

It presses its main pleas on the second complaint.

CONSIDERATIONS

1. The complainant used to have an indefinite appointment in the European Southern Observatory as a systems engineer. In 1995 it decided to set an outside contractor to take over some of its work in information technology and abolished his post. In his first complaint he is challenging the amount paid to him in end-of-service entitlements on account of such abolition. In his second he is impugning a decision of 19 September 1996 by the Director General to reject a recommendation by the Joint Advisory Appeals Board and uphold a decision of 6 December 1995 to end his appointment.

2. His two complaints, being closely related, may be joined to form the subject of a single judgment.

3. The ruling on his second complaint is in line with the judgment, delivered also this day, on a complaint from Mr. Rinze de Roos. This case is much the same, and the complainant's pleas are the same. The Tribunal allows his plea that the Observatory failed to make proper efforts to place him and it will set aside the impugned decision for the same reasons as in the other case. The ESO shall either reinstate him as from the date of dismissal or else, if it prefers, pay him damages equivalent to 36 months' base salary, less any amounts already paid to him in terminal indemnities or repatriation grant.

4. The termination having been quashed, his first complaint discloses no cause of action. His end-of-service entitlements must in any event be deducted from the sums the ESO owes him under this judgment.

5. He is entitled to costs, and the amount is set at 20,000 French francs.

DECISION

For the above reasons,

1. The Director General's decision of 19 September 1996 is set aside.

2. The Observatory shall either reinstate the complainant as from the date of dismissal or pay him damages as reckoned under 3 above.

3. It shall pay him 20,000 French francs in costs.

4. There is no need to rule on the first complaint.

5. His other claims in his second complaint are dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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