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

EIGHTY-FIFTH SESSION

***In re* Gilli and Noethe**

Judgment 1747

The Administrative Tribunal,

Considering the complaints filed by Mr. Bruno Philippe Gilli and Mr. Lothar Noethe against the European Southern Observatory (ESO) on 9 April 1997 and corrected on 23 May, the ESO's single reply of 20 August, the complainants' rejoinders of 27 November 1997 and the Observatory's surrejoinder of 27 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 none of the parties has applied for;

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

A. Article R VI 1.06 of the ESO's Staff Regulations requires the Director General to consult the Joint Advisory Appeals Board before deciding on an appeal. The second paragraph of Article R VI 1.11 says that, unless the appellant objects, the Director General's final decision and the Board's "recommendations" shall be brought to the notice of all members of staff.

By a letter of 19 September 1996 the Director General rejected an appeal from Mr. Rinze de Roos, a former staff member, against a decision to dismiss him because his post had been abolished: the Observatory had reformed his division, having brought in a firm to do some of the work: see Judgment 1745 also delivered this day on Mr. de Roos' case. In the same letter the Director General asked Mr. de Roos whether he objected to letting the staff know that decision and the Board's recommendations. On 7 October Mr. de Roos replied that he had no objection to publishing the texts "in full". The Director General decided to disclose only the part of the Board's report that was headed "Conclusions and Recommendations".

The complainants are both members of the staff. In memoranda of 22 October to the Director General they appealed against that decision on the grounds that it concealed the Board's opinion on essential issues such as the abolition of posts and the "outsourcing" of ESO work. They sought leave to go straight to the Tribunal.

The matter was referred to the Standing Advisory Committee. The head of Administration told the Committee that the Joint Advisory Appeals Board was to report. In a memorandum of 28 November to the chairman of the Committee the members of the Board said that the section of its report on its "findings" should also be made public.

In memoranda of 13 December the head of Administration told the complainants that since the text of the Board's "findings" was available in the library he saw no point in their pressing the appeals. They replied in memoranda of 18 December 1996 that since parts of the report were still missing they maintained their appeals; they would drop the matter if the ESO disclosed the full text and made a reasonable settlement with the Staff Association over costs. By memoranda of 13 January 1997 - the impugned decisions - the head of Administration told them he could not see what other means of redress they were seeking and gave them leave on the Director General's behalf to come straight to the Tribunal.

B. The complainants have two pleas. One is that the impugned deci-sions are in breach of Articles R VI 1.10 and R VI 1.11 of the Regulations and so unlawful. Those articles do not say that only the Board's "recommendations" need go to the Director General and be revealed to the staff. The term "recommendations" means the whole report. For international civil servants an internal appeal is "a sort of procedure of first instance" and the reports of an appeal body are like judicial rulings. So the whole report must be released: after all, the Board's reasoning and

conclusions may be hard to grasp unless the facts and pleas too are disclosed.

Secondly, the only possible explanation for the Administration's refusal to disclose the whole report is that it wanted to conceal the facts and pleas from the staff.

The complainants ask the Tribunal to quash the decisions of 13 January 1997 and award them costs.

C. In its reply the ESO contends that the complaints are irreceivable because they show no cause of action. It met the complainants' wishes since it let the staff see the "findings", as the Appeals Board had itself suggested. Besides, the decisions caused them no injury. Their real purpose in pressing their appeals was to get the Observatory to meet the Staff Association's costs, though staff unions do not as such have access to the Tribunal.

In argument on the merits the defendant points out that the Staff Regulations do not define the term "recommendations". In the second paragraph of Article R VI 1.11 the word is used in the strict sense and the practice of disclosing only the part so headed is in line. The Director General may, for the sake of confidentiality, disclose only the findings and the conclusions and recommendations. The Board's report is more like mediation than a court ruling.

D. In their rejoinders the complainants rebut the Observatory's objections to receivability. They contend that they do have a cause of action: the ESO's failure to publish the full report. The impugned decisions cause injury to them as to everyone else on the staff. Though a staff association has no access to the Tribunal, any member of one may challenge a decision that impairs his right of association. Their complaints rest on the Observatory's failure to inform staff of all matters affecting them, and so are receivable. They press their pleas on the merits.

E. In its rejoinder the Observatory presses its objections to receiva-bility. On the merits it submits that its construction of the word "recommendations" is the usual one. It maintains that it has settled the complainants' claims and that it is sheer abuse of process for them to have gone to the Tribunal.

CONSIDERATIONS

1. The complainants are employees of the ESO. They are asking the Tribunal to quash decisions of 13 January 1997, taken on the Director General's behalf, to let the staff see the full text of a report of the Joint Advisory Appeals Board. That report was about an appeal by a staff member, Mr. Rinze de Roos, whose post the ESO had abolished. The Director General did agree to let the staff see the Board's "findings" and "conclusions and recommendations", but not the first three sections of its report, which contained no recommendations as such. In the complainants' submission that was in breach both of the second paragraph of Article R VI 1.11 of the Staff Regulations and of the good faith that should govern relations between organisation and employee.

2. The Observatory replies that the complaints are irreceivable on the grounds that the complainants show no cause of action. It says that the Board's "recommendations" and "findings" did go to the staff; the refusal to disclose the rest of the report caused the complainants themselves no injury, they are obviously acting for the Staff Association, and that is the sort of case the Tribunal may not entertain.

3. The plea fails. Though the ESO did disclose part of the report, the complainants' point is that it failed to publish the full text. Though that did not cause them any particular injury, they do of course have a right to know in full the Board's findings and conclusions on a case of abolition of post due to "outsourcing". Even though the impugned decisions affect the staff as a whole and the complainants appear to be acting for many others, they are not representing a staff association in a class action against a general decision. They are making distinctly individual challenges to the rejection of their request for full disclosure. There is no abuse of process about that.

4. Besides being receivable, the complaints must succeed on the merits.

5. Article R VI 1.10 of the Staff Regulations reads:

"The Board shall submit its recommendations to the Director General in writing within 30 calendar days after the date of the last hearing to which the appellant and/or his representative have been summoned."

and Article R VI 1.11:

"The Director General shall notify the appellant of his decision in writing, within 60 calendar days after receipt of the Board's recommendations.

Unless the appellant objects, this decision and the recommendations of the Board shall be brought to the notice of the personnel."

The ESO argues that R VI 1.11 requires it to disclose no more than the Board's "recommendations" *strictu sensu*, viz. the findings and conclusions that afford the Director General guidance in taking a decision. The complainants retort that it is the full text as submitted to the Director General that must be made available, not just the Board's conclusions on what the outcome should be.

6. The wording of the Regulations is unclear. Yet the word "recommendations" may not bear a different meaning on each of the three occasions that it appears in the above texts. By the Board's "recommendations" is meant the entire outcome of its work as put to the Director General, even if it is divided into sections. For appeal proceedings to be properly adversarial the ESO must let the staff member have the full text of the Board's report. As a matter of fact it did so in this case: in sending the appellant the Board's "recommendations" the Director General drew no distinction between the various sections of the report but duly let him have the full text submitted by the Board. And when he came to apply the second sentence of R VI 1.11. he had no reason to put any narrower construction on the term. Actually the ESO has conceded that what it had to disclose might be not just the section headed "Conclusions and recommendations", since it also let the staff see the section on "findings" on which the Board had based its recommendations. It drew a distinction, though the report was an indivisible whole, between what might and what might not be revealed. The distinction is spurious if R VI 1.10 and R VI 1.11 are read together. There being no need to rule on the complain- ants' second plea, the impugned decisions must be set aside.

7. Since they succeed, the complainants are entitled to costs, and the Tribunal awards each of them 7,500 French francs.

DECISION

For the above reasons,

1. The Director General's decisions of 13 January 1997 are set aside.

2. The ESO shall pay each of the complainants 7,500 French francs in costs.

In witness of this judgment, adopted on 8 May 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Mella Carroll
James K. Hugessen

A.B. Gardner

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