EIGHTY-SEVENTH SESSION

In re Palma (No. 3)

Judgment 1843

The Administrative Tribunal,

Considering the third complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 25 February 1998, the ESO's reply of 11 May, the complainant's rejoinder of 15 June and the Observatory's surrejoinder of 20 July 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, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 29 October 1997, the complainant sent the ESO four medical certificates which, according to him, showed "the discovery of a new disability ... of professional origin and coming from [his] activity at ESO". On 17 November, he sent two further certificates and requested the Director General to convene a Rehabilitation Board. The head of Administration replied on behalf of the Director General on 5 December that a Rehabilitation Board could not be convened for a former staff member and that the causal link between his duties at the ESO and his illness had not been demonstrated by the certificates which he had sent.

By a letter of 11 December 1997, the complainant asked for the discussion on the subject to be kept pending while awaiting the judgment of the Tribunal on his first complaint against the ESO. On 10 February 1998, he requested the Director General to convene a Rehabilitation Board. By a letter dated 13 February the head of Administration rejected his request on behalf of the Director General. This is the impugned decision.

B. The complainant contends that the refusal to convene a Rehabilitation Board constitutes a breach of the Staff Rules and Regulations of the ESO. He submits that the Rules of the Pension Fund of CERN, to which the staff of the ESO is affiliated, provide for a period of ten years from the date of the end of the contract of employment during which a former member of the staff may claim for an occupational illness. He considers that he has medical proof that the discovered disability originated in 1990 when he worked at the ESO and has worsened since then.

The complainant asks the Tribunal to quash the impugned decision, order the convening of a Rehabilitation Board and grant him costs.

C. In its reply, the Observatory develops three pleas. Firstly, the complainant did not attend the compulsory medical examination "on termination of appointment" which he had been requested to undergo. The 1983 version of Article R II 4.20b) of the Staff Regulations, which became Article R II 4.21b) as from 1993, states that in such a case the staff member is disqualified from claiming any compensation for occupational injuries or illness. Moreover, the Staff Regulations do not envisage the convening of a Rehabilitation Board for former members of the staff. Finally, the medical certificates presented do not establish a causal link between the complainant's service at the ESO and his current state of health.

D. In his rejoinder, the complainant contends that the Director General should have consulted the Joint Advisory Appeals Board before taking the impugned decision and accuses the Observatory of bad faith. He recalls that his contract ended on 31 August 1995, but that he had been placed on special leave on 28 June. He considers that he could not therefore comply with the Observatory's request, made by a letter dated 30 June 1995, to undergo a medical examination "before [his] last day of work". He adds that the Staff Regulations make no distinction between "active" and former members of the staff and that Judgment 1665 ordered the convening of a "new

Rehabilitation Board".

The complainant further accuses the Observatory of having drawn the wrong conclusions from the medical certificates and of having committed errors of fact and of law. He accuses it of perjury and of breaches of fundamental human rights.

E. In its surrejoinder, the Observatory explains that "the last day of work" obviously referred to the last day of the contract, which went up to 31 August 1995. For the rest, it presses its pleas and reaffirms its arguments.

CONSIDERATIONS

1. The complainant joined the ESO on 1 September 1989. By a letter of 26 January 1995, the head of Personnel gave him notice that his contract would not be renewed when it expired on 31 August 1995. By another letter dated 30 June 1995 the head of Personnel informed him of his entitlements to terminal indemnities and of other administrative formalities connected with the ending of his contract; he was asked to take the twenty days that remained of his annual leave, failing which his "last working day" would be 2 August; and he was also told:

"Before your last day of work with the Organisation you should undergo the medical examination foreseen in Article R II 4.20b) of the Staff Rules and Regulations."

2. A staff member is required to undergo a compulsory medical examination on termination of appointment pursuant to the 1983 version of Article R II 4.19 and 4.20b) of the Staff Regulations, which became Articles R II 4.20 and 4.21b) in 1993, which provide:

"4.19 The Director-General may at any time require a member of the personnel to undergo an examination by a medical practitioner designated by the Organization.

4.20 This examination shall be obligatory, particularly:

(a) ...

(b) on termination of appointment. Failure to be examined shall disqualify a member of the personnel from any compensation in connection with injuries sustained or illness contracted as a result of or in connection with his period of service."

3. However, in an earlier letter dated 28 June 1995, the complainant had already been placed on immediate special leave pending investigations into certain allegations against him. In a letter from a senior personnel officer of 20 July 1995, his request to be allowed to return to work was refused because of those investigations. He was also told that, despite the seriousness of the facts then known, the ESO would refrain from disciplinary action as his contract was ending on 31 August. Thus the last day on which he actually worked was 28 June.

4. The complainant said nothing then about any difficulty in presenting himself for a medical examination whilst being on leave. Furthermore, in a letter dated 5 July 1995 he said that he would furnish copies of medical certificates as to his actual state of health. However, he neither underwent the required medical examination nor submitted such medical certificates.

5. By letters dated 29 October and 17 November 1997 (to which he annexed six medical certificates, all issued in 1997) the complainant told the Director General that he was suffering from a new disability which he claimed was attributable to his employment at the ESO. The complainant had been treated, since 1990, by a Dr Koerner, from whom there was no certificate; and from August 1997 by his successor, Dr Siedow, an orthopaedic specialist, whose medical certificate of 2 September 1997 states:

"[the complainant] has been a patient at this practice since 26 November 1990, and has been treated by me since 12 August 1997. The painful symptoms were first diagnosed at the end of 1990 and proved to be caused by a slipped disc at L.5/S1 level. The condition is degenerative and leads to permanent disability. Sedentary professional activity with inadequate rest periods has doubtless worsened the degenerative condition; the intervertebral disc stress surely dates back to 1990 ..."

The complainant has produced no evidence that his condition was brought to the notice of the ESO at any time prior to the termination of his contract.

6. In his internal appeal of 17 November 1997 the complainant asked the Director General to appoint a Rehabilitation Board to deal with his claim. Articles R II 1.25 to 1.27 of the Staff Regulations provide:

"1.25 ... any member of the personnel shall be deemed to be a handicapped person when he is declared to be such by the Rehabilitation Board and recognized as such by the Director General.

1.26 The Director General shall appoint the Rehabilitation Board referred to above. The Board shall examine the cases and recommend the measures to be taken concerning them on the basis of conditions and terms as defined in Annex R B 4.

1.27 When a member of the personnel is handicapped as a result of an illness or accident arising out of or in the course of his duties ... he shall be assigned to duties corresponding to his physical capacities."

Annex R B 4 authorises the Board to make recommendations:

"- concerning the nature (occupational or otherwise) of an accident or illness;

- concerning rehabilitation and incapacity:

a) for the recognition of handicaps;

b) for the rehabilitation of handicapped persons, their retention in their posts and, where appropriate, the conditions under which they are to be dismissed on grounds of incapacity confirmed by a medical certificate;

- concerning disability."

7. On 5 December 1997 the head of Administration wrote to the complainant on the Director General's behalf refusing to appoint a Rehabilitation Board. The complainant asks the Tribunal to quash that decision, to order the Director General to appoint a Rehabilitation Board and to award him costs.

8. The ESO contends, first, that the failure of the complainant to undergo the mandatory medical examination prior to the termination of his contract precludes him from claiming compensation for a work-related injury or illness.

9. The complainant submits that by the letter of 30 June 1995 he was required to undergo a medical examination before his "last day of work", but that he had already been placed on special leave before he received that letter. Thereafter the ESO refused to allow him to return to work. In this way it was the ESO that made it impossible for him to undergo the medical examination in time.

10. The ESO counters that the Staff Regulations plainly state the consequences of not undergoing a medical examination prior to termination of a contract, and that the complainant must be deemed to know the requirements of those Regulations: see Judgment 1141 (*in re* Tomson), under 18, and Judgment 1734 (*in re* Kowasch), under 3(e). The letter of 30 June drew his attention to the Staff Regulations, and although the head of Personnel referred to the "last day of work" it was obvious that he meant the termination of the complainant's contract.

11. A medical examination at the time of termination is not a mere formality: it is intended to establish with some degree of certainty - in the interests of both parties - a staff member's state of health upon termination. In any event, if the complainant really believed that the ESO - by suddenly sending him on special leave - had made it impossible for him to undergo the medical examination in time, he ought to have pointed that out as soon as he received the letter of 30 June, and requested an opportunity to comply with the Staff Regulations. Instead, he undertook to furnish medical certificates as to his state of health, but even that he failed to do at the material time.

12. The Tribunal holds that Article R II 4.20b) of the Staff Regulations disqualified the complainant from making a claim for compensation in respect of a work-related injury or illness discovered after termination, and the Director General was justified in not appointing a Rehabilitation Board.

13. The ESO further contends that the Staff Regulations provide for the appointment of a Rehabilitation Board only in respect of members of the personnel - not for former members of staff.

14. The complainant argues that the phrase "member of the personnel" in the Staff Regulations is wide enough to include both present and former staff members.

15. Articles R II 1.25 to 1.27 of the Staff Regulations show that the function of a Rehabilitation Board is to consider whether a "member of the personnel" is handicapped; and, if so, to make recommendations as to his rehabilitation, his retention in service (in the same or another post), or his dismissal on the ground of incapacity.

The Tribunal holds that Articles R II 1.25 to 1.27 of the Staff Regulations do not apply to former staff members, and that therefore the Director General was not obliged to appoint a Rehabilitation Board to deal with the complainant's claim.

16. Those conclusions make it unnecessary to consider the ESO's third contention that the medical certificates furnished by the complainant do not establish a causal link between his service and his present state of health. However, the Tribunal must place on record that the ESO stated when the claim was first made, and reiterated in its reply, that it is prepared to examine the complainant's claim if he provides substantiated evidence of a link between his duties at ESO and his state of health.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll
Mark Fernando
James K. Hugessen

Catherine Comtet

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