

EIGHTY-SEVENTH SESSION

In re Palma (No. 5)

Judgment 1845

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 18 June 1998, the ESO's reply of 16 October, the complainant's rejoinder of 12 November and the Observatory's surrejoinder of 14 December 1998;

Considering Articles II, paragraphs 5 and 6, and VII 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.

On 23 September 1997, the ESO issued a vacancy notice for an assistant to the head of Administration. The complainant applied for the post by a letter of 20 October. He indicated that he was "fully qualified" for the post, asked to be recruited as a "handicapped" person and warned the

Observatory against any discrimination. He suggested that the Observatory first select from the other candidates and then put the best of them in competition with him before an "independent board of selection agreed by arbitration/Tribunal". He specified the fields in which assistance should be given to the head of Administration. On 7 November, he completed the application form, explaining that his departure from the Observatory in 1995 was due to a "real conspiracy" by the former heads of Administration and Personnel, as well as his first-level supervisor. On 10 November 1997, the Observatory acknowledged receipt of his application and, on 15 February 1998, informed him that he would not be offered the post.

By a letter dated 28 March 1998, the complainant appealed against the decision not to offer him the post. He contended in particular that he had not been interviewed and that his disability had not been taken into consideration. Not having received a reply to his letter he challenges the implicit decision to reject his appeal.

B. The complainant says that he has not ceased since 1995 to apply for "reassignment" to the Observatory as a handicapped person. He submits that his qualifications, experience, state of health and his warning against any attempt to discriminate against him obliged the Observatory to take his application into account and call him for an interview. Instead, his application was rejected without any explanation, which, he maintains constitutes a violation not only of the ESO's Staff Rules and Regulations, but also of human rights as recognised by the International Labour Organization (ILO) and the United Nations.

The complainant asks the Tribunal: (1) to quash the impugned implied decision and consequently to order the Observatory to reopen the selection process for the post in question, unless another remedy can be found, and to refrain from any discrimination against him in the future; (2) to award him moral damages and costs; and (3) to "denounce" to the ILO, if it has the competence to do so, the violations that he is denouncing so that the ILO may impose on the Observatory or its member States a large financial penalty.

C. In its reply, the Observatory explains that the Selection Board only examines applications which have been chosen by the Administration. However, the Administration concluded that the complainant did not have the necessary qualifications for the post and, in particular, that the application form that he had completed showed flaws in his knowledge of English and "a serious lack of judgment". It also took into account the evaluation of his performance when he was in the service of the Observatory. It adds that his first and last claims are not receivable, as the Tribunal does not have the competence to make such orders.

D. In his rejoinder, the complainant contends that the Observatory's reply injures his professional reputation. He reports that, during his period of service with the Observatory, his performance was appreciated and he had obtained a promotion. He contends that he was the victim of discrimination by reason of his nationality and disability and believes that it would have been in the interests of the Observatory to use the knowledge that he had acquired in its service. He accuses it of bad faith and of "breach of due process".

The complainant changes his claims. He seeks the quashing of the impugned decision, but no longer specifies the consequences, and the denunciation of his case to the ILO. He maintains his claims to damages and costs.

E. In its surrejoinder, the Observatory submits that decisions concerning the appointment of staff members are within its discretionary authority and that the Tribunal therefore only exercises a limited review over the procedure. It says that the correct procedure was followed and that the complainant does not adduce any evidence to the contrary.

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, on the basis of the recommendation of the Contract Advisory Committee, the Director General had decided not to offer him an indefinite contract and not to renew his three-year contract when it expired on 31 August 1995.
2. On 19 July 1995 the complainant lodged a complaint with the Tribunal challenging the non-renewal of his contract, which he withdrew on 22 December 1995.
3. In 1994, whilst working at the ESO, the complainant felt a sudden pain in his left eye, which resulted in permanent loss of vision in that eye. In July 1995 the ESO Rehabilitation Board set the "degree of disability" and loss of earning capacity at 39 per cent. As set out in Judgment 1665 (*in re* Palma) under 4 and 5, the CERN Pension Fund awarded him, initially, a small "unsuitability pension", and upon appeal "*ex gratia* benefits equal to a partial incapacity pension of 40 per cent".
4. The complainant says that in August 1997 it was discovered that he was suffering from a new disability - an intervertebral disc prolapse - of which he informed the Director General in October 1997 (see Judgment 1843 *in re* Palma (No. 3), delivered today, under 5).
5. In response to a vacancy notice issued on 23 September 1997, the complainant applied for the post of assistant to the head of Administration. In a letter dated 20 October he submitted that his qualifications exceeded the ESO's expectations, and requested that he be appointed, and that account should also be taken of his disabilities. He urged the ESO not to discriminate against him - because the matter might come before the Tribunal - and he suggested that the ESO should first select the best candidate from among all the other applicants and then set up an independent selection board to decide between that candidate and himself on the basis only of capabilities and skills as demonstrated in certain areas which he specified.
6. On 10 November 1997 the ESO acknowledged receipt of the complainant's application, stating that he would be contacted if required to attend an interview. He was not called for an interview and on 15 February 1998 the head of Personnel informed him that he had not been selected.
7. The complainant appealed to the Director General on 28 March 1998, and not having received a reply, lodged this complaint on 18 June 1998. He asks the Tribunal:
 - (a) to quash the Observatory's implied negative decision and to order the ESO, unless it offers him an alternative and effective remedy, to reopen the selection procedure, and to refrain from further discrimination against him;
 - (b) to award him moral damages and costs; and
 - (c) to denounce to the ILO the ESO's wilful violation of his human rights in order that the ILO may impose a punitive sanction on the ESO or its member States for the proved breach of international conventions.
8. The complaint also contains various allegations as to the way he was treated in 1995. The Tribunal holds that

these allegations are not receivable, because the complainant failed to apply to the Tribunal within the period laid down in Article VII(2) of the Statute of the Tribunal.

9. The question arises whether the Tribunal lacks competence in regard to his claims because the complainant is no longer a staff member of the ESO.

10. The Tribunal has competence, *ratione personae*, to entertain the complaint because under Article II(6) of its Statute the Tribunal is open to a former staff member.

However, Article II(5) restricts the competence of the Tribunal, *ratione materiae*, to complaints alleging the non-observance, in substance or in form, of the terms of appointment of a staff member or of the provisions of the applicable Staff Regulations.

On expiry of the complainant's contract, he ceased to be a staff member. His complaint, concerning his non-selection, does not involve any allegation of the violation of any rights which he enjoyed under his contract or the Staff Regulations insofar as they continued to apply to him. The Tribunal therefore can neither entertain the complaint (see Judgment 1509, (*in re* Zhu), under 16, Judgment 1554 (*in re* Tögl), under 10, and Judgment 1707 (*in re* Broere-Moore No. 6), under 7), nor his consequential claims to moral damages and costs.

11. The complainant's other claims are for relief which the Tribunal is not competent to grant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
Mark Fernando

Catherine Comtet