

EIGHTY-SEVENTH SESSION

In re Ansorge (No. 2)

Judgment 1862

The Administrative Tribunal,

Considering the second complaint filed by Mr Wolfgang Richard Ansorge against the European Southern Observatory (ESO) on 23 December 1997 and corrected on 1 April 1998, the ESO's reply of 21 July, the complainant's rejoinder of 9 September and the Observatory's surrejoinder of 16 November 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. Some facts that are relevant to the present case are set out under A in Judgment 1739 on Mr Ansorge's first complaint.

By a memorandum dated 3 April 1997, the Director General informed the staff of ESO that the head of Administration would be taking over as safety manager, with immediate effect, and would replace the complainant. By a letter of 23 April 1997, the complainant appealed to the Director General against that decision asserting that he had not been informed of the reasons for it. He asked him to withdraw it, or if this was not possible, to authorise him to appeal directly to the Tribunal. He also complained that he had not been informed of the decision until after it had been made known to all the staff. That same day the complainant received a letter from the head of the Personnel Department confirming the decision.

By a letter dated 28 April, the head of Administration, after indicating that the complainant had indeed been informed of the decision before the staff as a whole, requested that he withdraw his appeal. The complainant refused to do so in a letter of 17 May.

Having examined the case, the Joint Advisory Appeals Board, in its report to the Director General dated 8 August, "unanimously but somewhat hesitantly" recommended "that the demands made by Mr Wolfgang Ansorge ... not be granted". By a letter of 30 September 1997, which is the impugned decision, the head of Administration informed the complainant that the Director General had decided to maintain his initial decision.

B. The complainant puts forward four pleas. First, he contends that the Observatory's decision is illegal since no reasons were given for it and it is based on manifestly mistaken conclusions. The complainant affirms that he was not informed of the reasons for the decision until the hearing of the Joint Advisory Appeals Board. The Board also noted that he had not been fully and properly informed of the reasons for his replacement. The complainant submits that his services were never evaluated and that he was never informed that he should improve them. He cites also the report of the Board which, in his opinion, is fully convinced that the ESO has not revealed the real reasons for its decision. He claims that the reasons for the decision included his opposition to his first-level supervisor and the Director General over contracts awarded to an Italian company.

Second, the complainant contends that the impugned decision is based on an error of law. He submits that, under the terms of a memorandum of 4 September 1995 concerning the "contract policy for international staff members" of the Observatory, the elements to be taken into account for the award of indefinite contracts are whether there is a long-term need for the post, and whether the staff member has the necessary level of performance, profile and potential. In the present case, the Contract Advisory Committee had considered that the functions of the complainant were of a permanent nature. Moreover, it had neither questioned the quality of his work nor his qualifications for the post that he occupied. By replacing the complainant, the Director General had therefore been in breach of the procedures outlined in the memorandum, and he should have awarded him an indefinite contract.

Third, the complainant contends that the impugned decision is based on misuse of power. He challenges the ESO's argument put forward during the internal procedure, that the decision was in the interests of the service and he cites the opinion of the Joint Advisory Appeals Board, which refers to "manoeuvres" by the ESO and expresses "doubts" concerning the real reasons for the decision. In the complainant's opinion, the real reason for his replacement lies in the Observatory's desire to "be rid" of him, particularly in view of his many disagreements with his first-level supervisor and the Administration on questions of safety. He explains in this respect that such disagreement was inevitable since his work consisted of ensuring that certain standards were adopted and applied, in order to ensure the safety of the infrastructure and officials. He alleges however that neither his supervisor nor the Administration were concerned about the safety of property or persons.

Fourth, he considers that the Observatory harmed his dignity and good name and that it caused him unnecessary and undue injury.

The complainant asks the Tribunal to order the quashing of the Director General's decision of 30 September 1997 and to award him costs.

C. In its reply, the Observatory does not contest the receivability of the complaint, but contends that it is unfounded.

It submits that the complainant was informed at a meeting on 21 January 1997 that the head of Administration would take over his functions relating to the ESO Safety Handbook, and that he did not appeal against that transfer of duties. The decision to replace him, contained in the memorandum of 3 April was confirmed the next day at a meeting that he had with the head of Administration, during which he was informed of the reasons for the decision. Since that memorandum was not distributed until 7 April, the complainant was therefore duly informed before the rest of the staff.

The Observatory emphasises that the decision to relieve the complainant of his duties as safety manager is within the discretion of the Director General. It affirms that, although the lack of satisfaction with the complainant's work was a factor, it was not the decisive factor in the decision. The Observatory did not therefore harm his good name. The technical competence of the complainant was never in question, as witnessed by the award of a salary increase, of which he was informed by a letter from Personnel Services dated 30 January 1997. The Observatory also justifies its decision on the grounds of the changing responsibilities of an ESO safety manager, which henceforth would require a legal background.

Finally, the Observatory contends that there was no misuse of power. It is because the complainant did not have the qualifications and specific experience henceforth required to perform the duties of safety manager that these functions were conferred to another person.

D. In his rejoinder, the complainant observes that a decision which lies within the discretion of the administration must nevertheless be accompanied by reasons and is subject to review by the Tribunal.

With regard to the Observatory's allegation that he did not appeal against the decision of 21 January 1997, the complainant explains that it was impossible for him to do so since the decision was neither written nor official.

He says that it is not true that he lacks a legal background since he had to deal with legal issues "for nearly twenty-five years in functions held before he joined ESO".

He refers again to his dispute with his first-level supervisor and the Director General concerning the award of contracts to an Italian company, and draws the Tribunal's attention to a letter indicating that some contracts with the company had been terminated, and which he produces as evidence that his warnings had been valid.

He reiterates that he should have been awarded an indefinite contract.

E. In its surrejoinder, the Observatory refutes the complainant's claim that he was unable to appeal against the decision of 21 January 1997 to replace him as safety manager because it was not communicated to him in writing. It has no obligation to issue its decisions "in writing only". It contends that the complainant's pleas are not founded on "objective evidence" and that his purpose is the same as in his complaint which resulted in Judgment 1739, namely that he wants the Tribunal to recognise that the Observatory wanted to rid itself of him. The ESO says that it does not understand the relevance to this case of the termination of a contract with a certain company. Finally, it

considers that the issue not to award the complainant an indefinite contract has already been examined in Judgment 1739.

CONSIDERATIONS

1. The complainant was engaged by the ESO as product assurance manager for its Very Large Telescope (VLT) project on 1 May 1991 under a three-year fixed-term contract. His contract was renewed on 19 November 1993 for a period of three years expiring on 30 April 1997. On 2 February 1995, the staff of the ESO was informed that the complainant had been made safety manager and would assume, in addition to his specific assignments in relation to the VLT, responsibility for safety and security in Chile and Germany.

On 30 October 1996, the complainant was offered an extension of his contract for a further two years, until 30 April 1999. Considering that he could claim a permanent appointment, he filed a complaint with the Tribunal challenging the Observatory's decision not to award him an indefinite contract. In Judgment 1739, the Tribunal dismissed the complaint.

2. An internal memorandum dated 3 April 1997, signed by the Director General, informed the staff of the ESO of the appointment of the head of Administration who has the overall coordination responsibility for matters of safety, security and environmental protection, as "safety and security manager", with immediate effect, replacing the complainant.

The latter appealed against that decision in a letter addressed to the Director General on 23 April 1997, stating that the reasons for the decision had not been communicated to him and that the way in which the case had been handled by the Observatory had harmed his dignity and good name.

3. On 8 August 1997, the Joint Advisory Appeals Board recommended the dismissal of the complainant's appeal. By a letter of 30 September 1997, he was informed by the head of Administration that the Director General had decided to confirm his initial decision.

4. The complainant asks the Tribunal to order the quashing of the Director General's decision, and to draw all the legal conclusions, since he considers that the Observatory breached its obligation to inform him of the real reasons underlying the impugned decision. In his view, the decision is based on clearly mistaken conclusions drawn from the facts.

The complainant submits that the decision is based on an error of law, that it constitutes misuse of power and that the Observatory was in breach of its obligations to respect his dignity and good name and to avoid causing him unnecessary and undue injury.

5. In the first place, it should be noted that the impugned decision, which consists of a reorganisational measure involving the withdrawal of certain functions, is the kind of decision that the Administration may take within its discretionary authority. Firm precedent has it that such decisions can only be set aside if they are tainted by certain flaws which make them illegal.

The Tribunal will therefore endeavour to determine whether the complainant has adduced proof of the existence of one or more flaws tainting the impugned decision.

6. The complainant contends that the impugned decision was taken without informing him of the real reasons why the Director General reached his decision and that it was based on mistaken conclusions drawn from the case.

7. This plea cannot be allowed. In this case, the reasons for the Director General's decision are to be found in the written submissions, and particularly in the memorandum of 15 January 1997. They were also stated during meetings on 21 January and 4 April 1997 and further developed in the remarks and comments made by the Administration in relation to the complainant's internal appeal. During the appeal procedure, it was indicated that the reasons for the impugned decision were the "increased workload with respect to the appellant's main responsibilities as VLT Product Assurance Manager as well as the intent of the Director General to change the responsibilities for setting up clear, comprehensive and adequate safety regulations for ESO within a short period of time" and that "taking into account that an essential part of this work [was] related to legal issues, it appeared appropriate to give this task to the Head of Administration".

8. The complainant submits that the real reasons for which the Director General took the impugned decision are not those indicated by the Observatory. The Tribunal notes that the complainant's arguments put forward in this respect, which were also made in the case leading up to Judgment 1739, are pure speculation and are not based on any proof adduced from the written submissions. The document annexed to the complainant's rejoinder, showing that ESO had ended certain contracts, cannot be considered evidence supporting the complainant's allegations.

9. Contrary to the allegations of the complainant, the impugned decision was brought to his knowledge before the staff was informed of it. The Observatory states, without being contradicted, that the memorandum of 3 April 1997 was not distributed to the staff until 7 April 1997 and that, before that date, on 4 April, a meeting was held during which the head of Administration informed the complainant of the Director General's decision. The occurrence of this meeting is not challenged.

10. The complainant submits that the impugned decision is based on an error of law. He contends that the Contract Advisory Committee had considered that his functions as safety manager were of a permanent nature and that it had neither questioned the quality of his work nor his qualifications for the post. He states that the Director General should have taken into consideration his qualifications, as well as the fact that the functions of safety manager responded to the conditions set out in the Observatory's new contract policy, and that he should have awarded him an indefinite contract for these functions. Furthermore, by deciding to withdraw these responsibilities, the Director General committed a procedural flaw. Finally, the Director General broke the promise to re-examine the impact of his functions as safety manager on his contractual situation.

11. In the above plea, the complainant returns to the decision taken by the Observatory not to award him an indefinite contract.

In Judgment 1739, the Tribunal has already ruled on this plea and does not find in the present case any error of law attributable to the Observatory which could taint the impugned decision.

12. The complainant submits that the impugned decision is based on misuse of authority. He says that the interests of the service were not taken into account, but only the desire to be rid of him because, in the context of his functions, he had had many disagreements with Administration.

The Tribunal observes that the complainant's allegations are not based on any evidence adduced from the written submissions.

13. In view of the above, the Tribunal finds that the impugned decision is not tainted by any flaw such as to lead to its quashing and that, in taking such a decision and communicating it as it did to the staff, the Observatory was not in breach of its obligations to respect the dignity and good name of the complainant, or to avoid causing him unnecessary and undue injury.

The complaint must therefore be dismissed.

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, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

