

EIGHTY-NINTH SESSION

In re Palma (No. 9)

Judgment No. 1949

The Administrative Tribunal,

Considering the ninth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 2 July 1998, the ESO's reply of 12 October, the complainant's rejoinder of 26 October, and the Observatory's surrejoinder of 3 December 1998;

Considering Articles II, paragraph 5, 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 national, served on the staff of the ESO 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 first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO. Under an agreement concluded in 1968 between the ESO and CERN, and as revised in 1983 and 1991, the staff of the ESO are participants in the Pension Fund of CERN.

While working at the ESO the complainant contracted an injury to his left eye, resulting in substantial loss of vision. An expert ophthalmologist determined the injury to be "unforeseeable and unpreventable" and the ESO Rehabilitation Board set the degree of disability and the loss of earning capacity at 39 per cent. The complainant was informed in a letter of 17 October 1995 that the Director General accepted the recommendations of the Rehabilitation Board to award the complainant an "unsuitability pension" under the CERN Pension Fund. On 2 December 1995 the complainant appealed against this decision to the Director General, complaining in particular that the decision omitted any provision for health benefits.

The Head of the Personnel Department informed the complainant in a letter of 3 June 1996 that following the decision of the CERN Pension Fund to grant him "ex gratia benefits equal to a partial incapacity of 40%, retroactive from 1 September 1995" instead of an "unsuitability pension", there would not be a "continuation of guarantees" under the health insurance policy administered by the brokers Van Breda. Individual continuation of coverage would have been possible only if he had requested it prior to leaving the ESO. On 22 August 1996 he also informed the complainant that Van Breda could provide him, exceptionally, with "a retroactive continuation of insurance coverage"; due to his 40 per cent *ex gratia* pension he would pay only 60 per cent of the premium. The complainant was invited to respond to this proposal and he informed the Head of the Personnel Department in a letter of 31 August that he was unable to agree to it. He also requested the ESO to confirm that its decision not to grant him full health insurance coverage as a rehabilitation measure was final so that he could appeal to the Administrative Tribunal of the International Labour Organization (ILO).

After receiving Judgment 1718 on his first complaint against the ESO, the complainant wrote to the Head of Administration on 9 February 1998 communicating his "availability to accept the ESO offer of health insurance". On 27 February 1998, Personnel Services forwarded to him Van Breda's new offer of health insurance coverage retroactive from 1 September 1995. This offer required him to pay the premium in a lump sum of 27,208.62 German marks. In a letter of 4 March 1998 the complainant said that he was unable to pay such a sum and asked the ESO to pay for fully insuring him from 1 September 1995; however, he said he would be able "to settle the matter with ESO" for his share at a later stage. Personnel Services replied on 26 March 1998 that the offer was valid only under the conditions laid out in the letter of 27 February. On 28 March the complainant wrote to Personnel Services that "health insurance for my 40% disability is a first duty of ESO" and requested the ESO to "agree to cover [him] immediately with full health insurance (or at least with [the ESO's] due 40%)". Having received no answer to this letter he appealed to the Director General on 14 April 1998. He is impugning the implied

rejection of his appeal.

B. The complainant argues that the ESO has a duty to provide health benefits for recognised "invalid" staff under its Staff Rules and Regulations as well as ILO and human rights conventions. He submits that this was established by both the ESO's Rehabilitation Board and the Tribunal in Judgment 1665. The complainant contends that the Rehabilitation Board, in making its recommendation for an unsuitability pension, "relied on the performance of a Health Insurance, inclusive and at charge of the Organization, as natural element of the Rehabilitation measures proposed for the Complainant". The complainant also objects to the terminology used in Judgment 1718 that he "rejected" and "turned down" the Van Breda offer of continued health insurance coverage, a human right that he has been claiming for three years.

The complainant asks the Tribunal to quash the implied rejection of his appeal and order the ESO to provide him with health insurance coverage, award him material damages in the amount of five million United States dollars "for an ESO deliberate behaviour against his health rights", and moral damages of at least one million dollars for the Observatory's "deliberate perjuries and slander". He also claims costs.

C. In its reply the ESO objects to the complaint's receivability. The complainant was informed in August 1996 by the ESO that he was not entitled to the continuance of health insurance coverage but that Van Breda was nevertheless willing to grant him exceptional retroactive coverage. The complainant did not challenge that decision at that time and any further claim on that score is time-barred. The ESO did not re-examine the question of the complainant's health insurance upon receiving his letter of 9 February 1998; it merely forwarded the request to Van Breda and transmitted its reply to the complainant. There is, therefore, no new decision to challenge.

In subsidiary arguments the defendant pleads that the complaint is devoid of merit. The ESO is under no obligation to provide health insurance to former staff members. Under the Observatory's Rules and Regulations the health insurance scheme applies only to "members of the personnel" and not to a former staff member. The only option available to the complainant was to seek individual continuation of coverage.

D. In his rejoinder the complainant objects to the ESO's statement of facts. He denies having rejected an earlier offer of health insurance by the ESO, since the offer dated 27 February 1998 was the first evidence of a "real offer". In addition, the ESO never contradicted his estimates that the health insurance would cost between 2,500 - 5,000 marks which, he implies, constitutes bad faith. He rebuts the ESO's objection to receivability and, citing the Tribunal's case law, argues that receivability is not an issue when the organisation has acted in bad faith and misled the complainant.

Furthermore, he argues that the letter of 22 August 1996 did not constitute a final decision. He appealed against the decision to the Director General on 15 September 1996 but had to wait for the outcome of Judgments 1665 and 1718 before being able to appeal to the Tribunal against the denial of health benefits. He alleges that Articles R D 2.01, 2.03 and 2.06 of the Staff Regulations clearly oblige the ESO to provide him with these benefits.

E. In its surrejoinder the ESO presses its objection to receivability. The question of the complainant's health insurance was decided by the Tribunal in Judgment 1718 and he is no longer entitled to challenge the Observatory's decision. The ESO denies bad faith. Since the complainant's status as a staff member ended on 31 August 1995, he had no right to membership in the organisation's health insurance scheme but could seek continued coverage on an individual basis. However, he has twice declined Van Breda's offer.

CONSIDERATIONS

1. The complainant attacks an implied negative decision of the Director General of his former employer, the ESO, for refusing to reply affirmatively to his request that the ESO provide him with health insurance.

2. In two previous judgments - 1665 and 1718 - the Tribunal has already made a number of specific findings of facts with respect to the complainant's employment history and his subsequent dealings with his former employer. These may be summarised as follows:

(a) the complainant did not appeal against the ESO's decision not to renew his contract when it expired on 31 August 1995; it is accordingly not open to the complainant to argue that he was dismissed because of his disability (Judgment 1665 under 10);

(b) the complainant is not entitled to payment of an incapacity pension having neither been dismissed nor reclassified because of incapacity (Judgment 1665 under 11);

(c) the complainant was originally granted an unsuitability pension but later obtained *ex gratia* benefits equivalent to a 40 per cent partial incapacity pension; this, however, was not an incapacity pension (Judgment 1665 under 13 and 17);

(d) the complainant was informed in August 1996 that although he was not entitled to continued health insurance coverage through the ESO, the insurance brokers, Van Breda, were prepared to grant him coverage from September 1995 upon his paying 60 per cent of the normal premium; that offer was turned down by the complainant (Judgment 1718 under 4 and 5).

3. The complaint is clearly irreceivable. It was filed on 2 July 1998 and, as it appears from the Tribunal's earlier findings summarised above, in August 1996 the complainant had been offered - and refused - insurance coverage for 60 per cent of normal premiums. If he wished to contest the decision contained in the letter of 22 August 1996, he should have done so at that time. He cannot, by renewing his request, revive a claim which is long out of time.

4. The claim is, in any event, without merit. Under the terms of the applicable Staff Regulations, the ESO is under no obligation to provide health insurance to its former staff members. The complainant cannot now claim that he was dismissed for incapacity or that his present alleged handicap is the result of his working conditions.

5. The complainant's allegations of slander, bad faith and perjury made against the ESO are not supported by any evidence.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet