NINETY-NINTH SESSION

Judgment No. 2460

The Administrative Tribunal,

Considering the thirty-sixth complaint filed by Mr F.P. against the European Southern Observatory (ESO) on 21 August 2003, ESO's reply of 8 January 2004, the complainant's rejoinder of 1 March, and the Observatory's surrejoinder of 30 April 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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 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 delivered on 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN), and in Judgments 1718 delivered on 29 January 1998 and 1843 delivered on 8 July 1999 on his first and third complaints against ESO.

During the proceedings leading to Judgment 1843, ESO had stated that medical certificates presented by the complainant did not establish a causal link between his service at the Observatory and his state of health; however, it asserted that it was prepared to examine his claim if he provided "substantiated evidence of a link between his duties at ESO and his state of health". This statement was recalled by the Tribunal in Judgment 2167 delivered on 15 July 2002.

In a letter of 31 July 2002 the complainant asked the Director General to review his disabilities "of ESO origin" for the purpose of health insurance and an incapacity pension; as proof of his claim he provided three medical certificates. The Observatory obtained an opinion from its medical consultant dated 31 October 2002, who noted that one of the certificates provided by the complainant did not address the issue of a causal link between the complainant's work at ESO and his state of health, but that the other two did consider the possibility of such a link. However, the medical consultant disagreed that such a causal link existed. The complainant's claim was subsequently rejected by the Head of Administration in a letter dated 2 December 2002.

The complainant wrote to the Head of Administration on 21 July 2003, submitting four additional documents in support of his claim. The Head of Administration transmitted this letter and its attachments to the medical consultant for a new opinion. The medical consultant telephoned the Head of Administration on 31 July, informing him that the additional medical documents presented by the complainant contained no new arguments or results. The Head of Administration made a "Note for the record" the same day concerning this information. He informed the complainant on 7 August 2003 that ESO's position, taken in the letter of 2 December 2002, remained unchanged. That is the impugned decision.

B. The complainant submits that upon receipt of Judgment 2167 he immediately provided ESO with the necessary evidence, by his letter of 31 July, to substantiate the "link" between his service at ESO and his state of health. The medical evidence he has provided conforms to the national laws on the subject matter. He considers that by providing new medical opinions he has proven that his disability is related to his former service at ESO, thereby satisfying the requirement set out in Judgment 2167. The Observatory has "perjured" itself by not upholding what it told the Tribunal in the course of previous proceedings and by changing "its law of reference" to German national law. He says that if ESO did not agree with the medical certificates, then it was under an obligation to substantiate its rejection of his request by sending him for an examination with a physician of its choice.

He asks the Tribunal to quash the impugned decision and to rule on "the acceptance" of the "links" he has provided. He also claims material and moral damages, plus costs.

C. The Observatory notes in its reply that the complainant did not file a complaint against the decision taken in the letter of 2 December 2002. It asks the Tribunal to consider the receivability of the complaint “ex officio”.

It contends that the complainant has not provided sufficient proof of any causal link between his duties at ESO and his state of health. It submits that it “did not intend to decide on [the] complainant’s requests on the basis of German law”; it referred to German law merely to illustrate the finding that the sort of medical claim made by the complainant affects all sectors of the population and that the conditions for recognising it as an occupational disease have not been met. The medical certificates provided by him are inconclusive. The Head of Administration was correct to base his decision in the note of 31 July 2003 on the verbal opinion of the medical consultant.

D. In his rejoinder the complainant reiterates that he has provided medical certificates, which refer to different national legislations, showing a “link” between his employment at ESO and his state of health. He submits that his complaint is receivable because no time limit was specified in either Judgment 1843 or Judgment 2167 as to when he must provide this proof. Furthermore, he says that the letter of 2 December 2002 did not constitute a final decision, because, among other reasons, it did not come on behalf of the Director General and there was also “a so-called status” of stay of proceedings between that date and 21 July 2003.

He accuses ESO of acting in bad faith and says that the decision taken in the note of 31 July 2003 was based on hearsay. He asserts that the Observatory’s reply is devoid of merit. The complainant argues that ESO and its legal counsel are not competent to judge the medical opinions that he has submitted. He offers to undergo medical examinations by physicians chosen by the Tribunal, should it decide that more medical information is necessary to rule on the dispute.

E. In its surrejoinder ESO reiterates that the complainant’s letter of 21 July 2003 did not provide any new or substantiated evidence of a causal link between his duties at the Observatory and his present state of health; consequently ESO was not obligated, according to the statement it made during the proceedings leading to Judgment 1843, to examine the complainant’s entitlements.

It points out that its relationship to staff is governed exclusively by its Staff Rules and Regulations; it objects to any reference to national law and says that it “sees little value” in “legal opinions” given by members of the medical profession. Furthermore, it observes that the national legislation cited by one of the physicians came into effect the year after the complainant’s employment with ESO had ended. Even if German law were to be relevant to this case, it submits that none of the certificates presented by the complainant provides any new fact likely to change ESO’s position.

CONSIDERATIONS

1. The complainant impugns a decision dated 7 August 2003 from the Head of Administration rejecting his claim of 21 July 2003 on the grounds that the Observatory had not found that the additional certificates submitted by him contained new facts. He contends that this decision is not in observance of Judgment 2167 (delivered on 15 July 2002) in which, he submits, the Tribunal noted that the Observatory had asserted that, should he be able to provide substantial evidence – such as a new medical opinion concerning his disease and the results of further medical examinations – establishing a link between his state of health and his duties, it would be willing to examine very carefully any claims that might arise from it. This requires an examination of previous judgments on cases brought by the same complainant.

2. It is clear for the Tribunal that the complainant’s reference does not come directly from Judgment 2167 but from Judgment 1843, under 16, where the Tribunal, in dismissing the complainant’s claim, decided to “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”.

The burden of proof was clearly on the complainant, because he had failed to undergo the compulsory medical examination before his last day of work in 1995. According to Article R II 4.20(b) of the Staff Regulations it is established that “[f]ailure 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” (as quoted in Judgment 1843, under 2).

Furthermore, Judgment 1843 also established that, since the complainant was a former member of staff, the applicable Staff Regulations did not provide for the appointment of a Rehabilitation Board. The complaint was dismissed on all counts, with the sole caveat having been introduced by the Tribunal under 16, referred to above.

3. It is to be noted, as a matter of record, that Judgment 1665 stated that the Observatory did convene a Rehabilitation Board in 1995, when the complainant was still in service, which concluded that his condition "cannot be classified as either occupational or professional" (see under 4). Later on, the Pension Fund of CERN, in which the ESO staff are participants, accorded him an "unsuitability pension" of 485 Swiss francs a month as from September 1995; in 1996, the Governing Board of the Fund decided to grant him instead "*ex gratia* benefits equal to a partial incapacity pension of 40% retroactive from 1 September 1995", amounting to 2,178.75 francs a month in 1996 (see under 5). Furthermore, when the complainant was recruited in 1989 he was already suffering from innate myopia and a medical examination conducted in 1994 determined that "[i]t [was] certainly not working at the screen that caused [his] injury".

The Tribunal also determined that his contract had come to a natural end, that he had not been dismissed or reclassified because of "medically confirmed incapacity", and that he did not appeal against that decision. In Judgment 1665, under 10, the Tribunal found that "[i]t [was] therefore no longer open to him to plead that he was dismissed because of his disability […]. So any claim he found[ed] on such a plea must fail."

4. For the record, all claims of the complainant have so far been dismissed by the Tribunal in Judgments 1665, 1718, 1843, 1844, 1845, 1948, 2001 and 2167.

5. Of all these precedents, most relevant for the instant case is Judgment 2167, where the Tribunal, considering the complainant's 23rd complaint, was satisfied that the caveat it had noted in consideration 16 of Judgment 1843 had been fulfilled, namely by the letter of the organisation mentioned in consideration 2 of Judgment 2167.

Considering the complainant's 24th complaint the Tribunal rejected the complainant's claim "that the organisation resubmit his case to the Rehabilitation Board" as well as his argument that the organisation was wrong when it said that it "would not reopen any internal procedure in connection with his case" after having rejected his further requests for review (see Judgment 2167, under 3).

In the same vein, the same judgment under 4 stated that the complainant's 25th complaint reiterated matters that "have already been examined and duly answered by the Tribunal" and it was therefore dismissed under the principle of *res judicata*. The complainant's 33rd complaint was likewise dismissed under *res judicata*.

6. The impugned decision in the present case is a letter dated 7 August 2003 from the Observatory to the complainant which states:

"We acknowledge receipt of your letter [dated] 21 July 2003. The arguments you give do not in our opinion bring forward any new facts but largely correspond to those of your letter [dated] 31 July 2002, to which we have already replied in detail.

For this reason, our point of view as expressed in our letter [dated] 2 December 2002 remains unchanged."

It is clear for the Tribunal that this 36th complaint is practically a reiteration of the claims and arguments put forward in the case which led to Judgment 1843, by which the Tribunal dismissed the complainant's third complaint, where the organisation had made the same assertion later noted again in Judgment 2167. Also, the complainant once again raises matters that have already been dealt with in Judgments 1665 and 1948.

Furthermore, the impugned decision merely reiterated what had already been decided by the Observatory on 2 December 2002, that is the rejection of the complainant's claim of 31 July 2002.

It is the Observatory's contention that the complainant's claim of 21 July 2003 is essentially the same as his claim of 31 July 2002, and it further expects the Tribunal to examine the receivability of the complaint on its own motion.

7. Since so many repeated claims with only slight variations in evidentiary documentation have already been ruled on, the Tribunal finds that *res judicata* applies.

8. The Tribunal also finds that the Observatory made a reasonable evaluation of the complainant's new documents, thereby again complying with Judgment 1843 even though it had already done so as decided in Judgment 2167, and therefore no further medical proceedings should be ordered by the Tribunal as suggested by the complainant in his rejoinder.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.