

THIRTY-SIXTH ORDINARY SESSION

***In re* ANCIAUX**

Judgment No. 266

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Southern Observatory (ESO) drawn up by Mr. Georges Fernand Anciaux on 14 April 1975, the ESO's reply of 30 June 1975, the complainant's rejoinder of 1 July 1975, the ESO's surrejoinder of 28 September 1975, the complainant's further memorandum of 29 October 1975 and the ESO's reply thereto of 28 November 1975;

Considering Article II, paragraph 5, of the Statute of the Tribunal, ESO Staff Rules and Staff Regulations dated 1 July 1971, particularly Article S II 5.03 of the Staff Rules, and the Combined Staff Rules and Staff Regulations dated 1 July 1974, particularly Article R II 6.03 of the Staff Rules;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. The ESO assigned the complainant to Chile as a grade 9 administrator on a two-year contract dated 15 December 1972. At the time the contract was concluded the Staff Rules and Staff Regulations in force were those published on July 1971. On 1 July 1974 they were replaced by the Combined Staff Rules and Staff Regulations.

B. Shortly after the complainant's appointment his behaviour, according to the ESO, began to arouse criticism. His conduct being regarded as unsatisfactory, he was told that at the end of the six months' probation period his appointment would not be confirmed for the total contractual period of two years as it would normally have been, but that the probation period would be extended. That period was extended first by three and later by six months.

C. A series of untoward incidents then occurred which are described by the ESO and which gave cause to doubt whether the complainant possessed the qualities required in an international official. In June 1974 the ESO had to decide whether to keep the complainant after the expiry of his current appointment on 15 December 1974. It believed that he was lacking in integrity, and apparently only with great reluctance had it resolved to renew his contract after 15 December 1974 for one year when further incidents occurred and it decided that after all the complainant would have to leave at the end of his contract.

D. Accordingly by letter of 18 July 1974 the ESO officially informed the complainant that his contract would not be renewed after 17 December 1974. Referring to Article S II 5.03 of the Staff Rules in force since 1 July 1971 and in order to respect the period of notice prescribed therein, it also told him that his contract would be extended from 15 December 1974 to 31 January 1975. The complainant did not accept that extension. In his reply of 12 August 1974 to the letter of 18 July he said he would appeal against the decision not to renew his contract on the grounds that the six-month period of notice prescribed in the Staff Rules had not been observed. The ESO points out, however, that in a later letter, dated 18 November 1974, the complainant uses the phrase "Since my contract with ESO expires on 14 December 1974 ..." - which in the ESO's view shows that he accepted the decision not to renew his contract.

E. Since the complainant's appointment was not to end until 31 January 1975 he would normally have continued to perform his duties even after receiving the Administration's letter of 18 July 1974. Since, however, further incidents occurred (sale of a generator in suspicious circumstances and drinking of alcohol on duty, contrary to the rules in force), the complainant was informed by letter of 19 August 1974 that disciplinary action aiming at his dismissal was to be taken and that pending the outcome of the disciplinary proceedings he was suspended with payment of salary. In accordance with the provisions of the Staff Rules and Staff Regulations which had come into force on 1 July 1974 and after consulting the Joint Advisory Disciplinary Board the Director-General notified the complainant

by letter of 25 October 1974 of the disciplinary measures taken against him, namely suspension until 31 January 1975 with payment of salary only up to 31 December 1974. The Joint Advisory Disciplinary Board had found certain extenuating circumstances in the case and recommended merely a written reprimand.

E. By Letter of 12 August 1974 the complainant declared his intention to appeal against the decision not to renew his contract and the ESO then convened the Joint Advisory Appeals Board. The Board concluded: (a) that the decision not to renew his contract had not been notified to him within the six-month period prescribed in the Staff Rules; (b) that the one-and-a-half months' extension of contract offered to the complainant in order to meet the requirement of six-months' notice was not provided for in the Staff Rules; and (c) that the Board was therefore confronted with a gap in the Staff Rules. The Board concluded that since the complainant might have expected his contract to be renewed he should be offered either compensation for the prejudice he had suffered or renewal of his contract. By letter of 31 January 1975 the Director-General announced his decision not to endorse the Board's recommendations and confirmed his decision not to renew the complainant's contract. That is the decision which the complainant now impugns.

G. In his complaint the complainant contends that there is a legal link between the renewal of contract and the initial appointment and that that link confers a right to renewal which was not respected in his case. The usual practice in renewal of fixed-term appointments if the Director-General does not exercise his power to renege within the time limit prescribed before the expiry of the appointment. His expectation was not fulfilled. The Director-General's decision of 18 July 1974 not to renew his contract is tainted with procedural irregularity in that it was notified to him less than five months before the expiry of the contract whereas the Staff Rules stipulate at least six months' notice. Moreover, the decision is tainted with illegality, since the period of notice which had been legal under the actual terms of the Staff Regulations was not respected. Again, the decision of 18 July 1974, upheld on 31 January 1975, is based on a misrepresentation of the facts. Lastly, it is tainted with abuse of authority in that his right to a hearing before it was taken was infringed.

H. The complainant asks the Tribunal: to quash the Director-General's decision of 18 July 1974, upheld on 31 January 1975, not to renew his contract, as being tainted with various errors and flaws; to order his reinstatement in the position he held on 15 December 1974 by extending his final fixed-term contract by three years (in accordance with recent practice in the ESO) with effect from 15 December 1974 with retroactive payment of salary and related allowances and benefits; or, failing reinstatement, to order the ESO to pay him a sum equivalent to three years' net basic salary plus related allowances and benefits, account being taken of the increase in annual salary and remuneration which he might have received under a new contract, over and above the compensation he received on leaving the organisation; in compensation for the damage done to his professional reputation and career, the animosity shown against him and the emotional and moral prejudice which he has suffered, to order the ESO to pay him "ex aequo et bono" a sum equivalent to two years' net basic salary; to order the ESO to pay his costs; and to order payment of interest from 15 December 1974.

I. The organisation first raises the question of receivability. It contends that by his letter of 18 November 1974 (see the end of paragraph D above) the complainant unreservedly accepted the decision not to renew his contract. In its view that acceptance and that alone is enough to prevent him from later changing his mind and pursuing his claim under the internal procedure and before the Administrative Tribunal. His consent of 18 November 1974 to the impugned decision stops him from withdrawing his acceptance: "non venire contra factum proprium". The fact that out of courtesy towards the Appeals Board and a desire to render him full justice the ESO took part in the internal proceedings does not detract from the validity of this objection to the receivability of the complaint.

J. As to the merits, the organisation points out that according to Article R II 6.03, of the Staff Rules in force when the complainant was told that his appointment would not be renewed and Article S II 5.03 of the Staff Rules in force up to 30 June 1974, a fixed-term contract shall automatically expire at the end of the prescribed period without there being any need to inform the official; the Director-General's decision shall be notified only if it is a decision to renew the contract; otherwise the Director-General is not required to confirm the expiry of a contract. The organisation states that it was only by oversight that in its letter of 18 July 1974 it referred to Article S II 5.03 of the Staff Rules in force up to 30 June 1974, which corresponds to Article R II 6.03 of the Staff Rules applicable from 1 July 1974. In view of the explanations given above it considers that the reference to that provision was unnecessary. Since the complainant had a fixed-term contract expiring on 15 December 1974 no notification was required from the Administration to terminate its contractual links with him on that date. A notification, followed by acceptance on the part of the complainant, would have been necessary only if the organisation had wished to renew the contract. "There is a rule of administrative law that in individual decisions an authority is bound to

respect the general rules which it has itself established. The notification of 18 July 1974 was unnecessary in view of Article R II 6.03 of the Staff Rules. Superior weight should therefore be given to the general rule and the decision of 13 July 1974 should be overlooked." Even assuming that the notification of 18 July 1974 demonstrated an attitude which the complainant was entitled to invoke against the Administration he cannot properly base any claim thereon. Article R II 6.03 prescribes a six-month period of notice. Five months all but three days elapsed between 18 July and 15 December 1974. In its letter of 18 July 1974 the organisation offered an extension of contract to 31 January 1975 so that the period of notice actually given was six months and thirteen days. The complainant did not suffer any prejudice by reason of the fact that the notification of non-renewal of his contract was made to him five months less three days before 15 December 1974, particularly since with the extension of his contract to 31 January 1975 the six-month period of notice was fully respected.

K. The organisation refers to the complainant's contention that the impugned decision was based on errors of fact. The organisation points out that according to the Tribunal's well-established case law "refusal to renew an official's contractual appointment is a discretionary decision" and hence the Tribunal may interfere with it only within the scope of its limited power of review. It is not contested that the Director-General was competent to notify by his letter of 31 January 1975 his decision not to renew the complainant's contract. That decision did not infringe any formal or procedural rule. The decision was taken in the interests of the organisation "after the Administration had shown rare patience and forbearance in the hope of persuading the complainant to mend his ways". Lastly, the decision is not based on any error of law or of fact, was taken with due regard to all the circumstances of the case, and drew correct conclusions from the dossier.

L. The ESO asks the Tribunal: as to the form: (1) to declare itself competent to hear the complaint; and (2) to declare the complaint irreceivable; as to the merits: (a) principally: (3) to dismiss all the complainant's claims as unfounded and award costs against him, including a fair contribution to payment of the organisation's lawyer's fees; and (b) subsidiarily: (4) to reserve to the organisation the right to refute all the complainant's allegations and allow it to establish by all legal means, including witnesses, the facts on which it relies.

CONSIDERATIONS:

The complainant appeals to the Tribunal against the Director-General's decision, notified to him on 18 July 1974, not to renew at the date of expiry, 15 December 1974, the two-year contract which he had held since 15 December 1972. That contract was later extended to 31 January 1975 to meet the requirement of six months' notice.

The total or partial renewal of a fixed-term contract, to which an official is in no way entitled, is a decision which falls within the discretionary authority of the head of the organisation alone. The Tribunal will not interfere with such a decision unless it was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.

It appears from the documents in the dossier that the impugned decision is not tainted with any formal or procedural flaw; that in particular the period of notice was respected in view of the extension of the contract; that the decision is based on correct and adequate grounds; and that it respected the right of defence.

It also appears from the facts of the case that at least since 1973, the complainant's attitude had not been such as is expected of an international official and that in particular he committed serious acts of misconduct which cast doubt on his integrity.

The behaviour of which the complainant was accused - and the falsity of those accusations is not established - is such as to afford lawful grounds for the impugned decision. It was open to the Director-General to take disciplinary action against the complainant on the grounds of that behaviour and he was therefore entitled, as he in fact did, merely to refuse to renew his contract. It appears from the foregoing that the complaint should be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right

Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 12 April 1976.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

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