

FORTY-SEVENTH ORDINARY SESSION

***In re* LE LUYER**

Judgment No. 465

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Southern Observatory (ESO) by Mr. Maurice Le Luyer on 10 February 1981 and the ESO's reply of 29 May 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article RA 10(b)(1) of the ESO Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant joined the staff of the ESO in 1974 under a three-year contract. His contract was renewed on 1 October 1977 and was to terminate on 30 September 1980. By a letter of 19 September 1979 the ESO offered him a contract without limit of time. By a letter of 25 June 1980 he declined the offer. On 23 July 1980 the Chief of Personnel acknowledged receipt of that letter and stated that he noted that the complainant was resigning. In a letter of 28 July the complainant replied that he had not resigned but merely intended to decline the offer of the new contract. He also claimed the termination allowance provided for in the Staff Regulations. He was refused that allowance by a letter dated 13 August, and on 9 September he appealed to the Joint Advisory Appeals Board against that decision. On the Board's recommendation the Director-General upheld that decision on 19 November and that is the final decision now impugned.

B. The complainant believes that he ought to have benefited under Article RA 10(b)(1) of the Staff Regulations, which relates to termination indemnities and grants. ⁽¹⁾ He argues that the use of the definite article in the English version of the text clearly denotes a particular fixed-term contract, which in this case was the contract for the period from 1 October 1977 to 30 September 1980. In proposing a contract without limit of time the ESO was offering him a new appointment, not an extension or renewal of the one he already had. A contract is extended only if all its terms hold good, including its duration. The planned transfer of the complainant's division to Munich made for serious difficulty for him and his family. He discusses the findings of the Joint Advisory Appeals Board and observes, among other things, that it is immaterial that the contract offered to him was more favourable than the previous one, since he had the right to decline it without forfeiting his rights under the rules, although he acknowledges that he would not have been entitled to any allowance had he accepted the offer of the contract without limit of time. He invites the Tribunal to quash the Director-General's decision and to order payment to him of the sum of 17,274 Swiss francs which he ought to have received under Article RA 10(b)(1) of the Staff Regulations.

C. In its reply the ESO comments on the use of the definite article in the English version of the provision. It points out that the offer of an extension without limit of time is in essence a proposal to make the contractual relationship permanent. The organisation thereby surrenders its right to refuse an extension and, had the complainant accepted the offer, he would have enjoyed greater security. There was no new or different contract. As for the family problems which the complainant says that the removal of his division to Munich would have caused, such a move was expressly mentioned in 1977 when his original appointment was extended by three years and he did not express the slightest objection. The ESO does not deny that the complainant was free to decline the offer of an extension without limit of time; but that does not mean that he may claim allowances payable where, for whatever reason, the organisation does not offer to extend or to renew a contract. The ESO accordingly invites the Tribunal to dismiss the complaint, and exceptionally to award costs in whole or in part against the complainant.

CONSIDERATIONS:

1. Under a contract which he signed on 1 October 1974 and which in 1977 was renewed for three years the complainant was appointed to the staff of the European Southern Observatory. At the end of 1979 the organisation offered him an extension when the contract concluded in 1977 was to expire, on 30 September 1980. Under the new contract, however, he was to have, not a three-year appointment as before, but one without limit of time.. By a letter dated 25 June 1980 he declined the offer. No other offer having been made, his employment in the organisation terminated on 30 September 1980.

The complainant is making a claim under Article RA 10(b)(1) of the ESO Staff Regulations, which provides for the payment of an allowance "in the event of non-extension or non-renewal of the contract on the part of the Organization".

2. One preliminary point is that the complainant did not resign, as the organisation mistakenly stated in a letter to him. What he did was to decline the offer made to him, and in law that is a different matter. This mistake has no bearing on the Tribunal's decision.

Nor is there any substance to the plea the complainant bases on the reference in the rules to extension of "the", not "a", contract.

3. The Tribunal will base its decision on a reading of the rule in its general context.

The complainant acknowledges that he would not have been entitled to the allowance had he accepted the offer of an appointment without limit of time, and that is beyond doubt. But he maintains that he may claim under Article RA 10(b) because what he was offered was not an ordinary extension or renewal; that if, on the expiry of a fixed-term contract, there is no agreement between the parties, the organisation has no choice but to offer an extension with no amendment of the terms other than the period of validity; and that it is therefore immaterial whether the organisation's offer is more or less favourable to the staff member.

This reasoning fails. At the end of each period of employment the parties have an opportunity to review the terms of the expiring contract. A radical recasting of the terms might be treated as constituting a break of a kind warranting the grant of the allowance. Subject to review by the Tribunal, however, the organisation may, with due regard to its own interests and to the staff member's rights, offer new contractual terms, and these may relate to various matters such as working conditions, the duty station, the duration of the contract and so on. Not every offer will be such that the staff member who declines it and leaves may claim the indemnity: it is all a matter of degree.

4. The ESO's offer to convert the complainant's fixed-term contract into a contract without limit of time was not arbitrary. It was evidence of the organisation's view that it need no longer reconsider at regular intervals whether or not to employ him, and evidence therefore of its confidence in him. Had he accepted its offer it could have got rid of him only if he had committed a disciplinary offence. He would have enjoyed greater employment stability and yet he would still have had the right to terminate the contract at any time. His obligations towards the organisation would therefore have been no greater.

It appears from the evidence that he declined the offer because the organisation was planning to move his division from Switzerland to Munich. Such a move would, it is true, have made a difference to his way of life. But the Tribunal sees no causal link between the ESO's proposal and the change in the complainant's duty station. The ESO had warned him in 1977, when he had first had his contract extended, that it might make the move. Whatever the duration of his appointment, his difficulties would have been the same when the move took place.

Consequently the ESO did not refuse to renew his contract, and the complaint cannot be allowed.

Costs

The Tribunal disallows the ESO's application for a full or partial award of costs against the complainant.

DECISION:

For the above reasons,

The complaint and the ESO's application in respect of costs are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner

1. Article RA 10(b)(1) reads:

"In the event of non-extension or non-renewal of the contract on the part of the Organization: one half of a month's basic salary per completed year of uninterrupted service up to a maximum of five months' basic salary."

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