FORTY-EIGHTH ORDINARY SESSION

In re ACOSTA ANDRES

Judgment No. 508

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Southern Observatory (ESO) by Miss Maria Isabel Acosta Andres on 30 July 1981 and brought into conformity with the Rules of Court on 19 August, the ESO's reply of 30 November, the complainant's rejoinder of 29 December 1981 and communication of 27 January 1982, and the ESO's surrejoinder of 3 March 1982;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, the Staff Regulations Applicable to Members of the Personnel except Local Staff, particularly Articles R II 6.02, 10 and 11, and R VII 1.06, the Regulations for Local Staff Members, particularly Articles LS II 5.01, 03, 04(10) and 05, LS VI 1.01, 05, 06 and 07, and Annex A 3 1.01;

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 ESO in 1972 as a secretary in its office in Santiago de Chile. She obtained an indefinite contract. By a letter of 6 March 1981 a personnel officer informed her and 17 others that for economic reasons the ESO had to reduce local staff and that their posts would be abolished on 9 March under Article LS II 5.04(10) of the Local Staff Regulations. Besides thirty days' salary provided for under LS II 5.03 (payment of salary in lieu of notice) and on indemnity payable under Annex A 3 1.01, she was offered as ex gratis, compensation her basic salary for the rest of March and for April 1981. Together with seven of the other staff members the complainant addressed an appeal to the Director of the ESO in Chile in accordance with Article LS VI 1.06. Her letter was forwarded to the Director-General in Garching (Federal Republic of Germany), who in his reply dated 4 May rejected the appeal, except for a claim for retroactive salary adjustments, which he said was still under review. That letter, which the complainant states that she received on 22 May 1981, is the decision she is challenging.

B. The complainant contends that her dismissal should be quashed on the grounds that essential facts were disregarded. Under Article LS II 5.04(10) a contract may be terminated to meet the "functional requirements" of the organisation. This article was taken verbatim from the Chilean Labour Code, which the Chilean courts have interpreted as justifying termination only when there are permanent economic difficulties irrevocably affecting future operations. The termination was not justified by any such difficulties. The 18 dismissals made savings of only 1 per cent of the budget. The organisation has since been recruiting staff, and the complainant believes that its real purpose was to replace permanent with short-term employees or to contract out work. The complainant's functions are essential and still being performed. The decision was also tainted with procedural flaws in that no period of notice was given; the ESO merely offered the indemnity provided for under Article LS II 5.03. There was breach of Article R II 6.10, which states that no staff member shall be dismissed on grounds of abolition of post or staff reduction unless the Director-General has ascertained that he cannot be transferred. There is no evidence of the Director-General's having done so. Article R II 6.11 of the Staff Regulations applicable to international staff members, which prescribes periods of notice for such staff members, should be applied because otherwise there would be discrimination against local staff. Moreover, from 1979 the complainant served as a delegate of the Santiago staff on the Council of the Local Staff Association (AUPL) and on a joint standing salary committee. According to Article R VII.1.06 of the Staff Regulations applicable to international staff members, which the ESO informed the AUPL in 1976 that it would apply to AUPL officials, "The performance of Staff Association duties shall not affect careers or disciplinary measures. In particular, before any official of the Association is dismissed ... owing to the suppression or abolition of a post or a reduction in total staff ... the Director-General shall consult the Joint Advisory Appeals Board". The Director-General ought to have appointed a committee with staff representation to advise him on her appeal. She invites the Tribunal to quash the decision impugned and order her

reinstatement and payment of salary from 9 March 1981 up to reinstatement; subsidiarily, to order payment of compensation for unjustified dismissal equivalent to six times her total gross remuneration from 1 January 1980 to 28 February 1981, plus interest at 12 per cent a year from the date on which she filed her complaint; further subsidiarily, to order payment of the benefits provided for in the local Staff Regulations and offered in the letter of dismissal at "adjusted value". She makes three further claims. One is that the ESO should make social security contributions for her in accordance with the Chilean social security system, i.e. take account of the five monthly payments made to her in the form of gratuities (aguinaldos). Another is that she should be entitled to any retroactive adjustment of salary up to the date of her dismissal in accordance with the local staff annual salary study. She also claims costs.

C. In its reply the ESO submits that the complaint is irreceivable. The letter of 6 March obviously embodied the Director-General's own final decision, and since over ninety days elapsed between 6 March and the filing of the complaint, the complaint is time-barred. Subsidiarily, the ESO submits that it is unfounded. Chilean case law is irrelevant even if the ESO rules are identical to those of the Chilean Labour Code. The authority to dismiss the staff in Chile is vested in the Director in that country but since there was no such Director reverted automatically to the Director-General. The Director-General did not exceed the limits of his discretion. In particular he did not disregard the "essential facts" alleged by the complainant, namely the organisation's true financial position. The ESO's financial difficulties (due to such factors as the rate of exchange between the Chilean peso and the United States dollar, and the rate of inflation in Chile) warranted the dismissal. The complainant's post has been abolished and whatever is left of her functions has been absorbed by the remaining staff in Santiago. The decision did not violate the terms of her appointment. The allegations of procedural defects are unfounded. The provisions on notice in Article LS II 5.03 were fully complied with, despite discrepancies between the English and Spanish versions, since the most favourable treatment was given: payment of the salary in lieu of notice prescribed by the Spanish text and the severance pay required under Annex A 3 by the English text. The complainant is entitled to no more than the sums offered to her under the settlement of 6 March 1981, namely 493,872 Chilean pesos, minus sums representing one month and 22 days of basic salary offered ex gratia (the ESO feels no longer bound by this offer). The Staff Regulations governing international staff expressly do not apply to the local staff and the complainant may not benefit under both LS II 5.03 and R II 6.11. Her case was thoroughly looked into, but because of a decrease in the workload and budget constraints reassignment proved impossible. She was not qualified for the posts advertised in the press after her dismissal; otherwise she could have applied. Her functions have not been contracted out: the work contracted out is more menial. As for her allegations of breach of Article R VII 1.06, she was not on the AUPL directorate either in 1979 or at the time of dismissal. She did sit on an informal working party on salaries set up within the AUPL, but it is not recognised by the ESO in formal negotiations. The ESO does not extend protection to any member of such a body. The ESO invites the Tribunal to dismiss the other claims. Its practice - fully supported by the local staff - has been to ignore the gratuities in calculating its social security contributions, and there is nothing in the complainant's terms of appointment which entitles her to be treated differently. Nor may she claim retroactive salary increases: the matter being still under review, the claim is irreceivable under Article VII of the Statute of the Tribunal. The ESO is nevertheless willing to extend to the complainant for the period from 1 July 1980 to 6 March 1981 any such increases as may be granted to the rest of the local staff.

D. In her rejoinder the complainant rejects the contention that her complaint is time-barred. She was entitled under Article LS VI 1.01 - and indeed required in order to exhaust the internal means of redress - to lodge an internal appeal by writing first to the Director in Chile, and she did so by her letter of 6 April 1981. Article LS VI 1.07 provides for further appeal to the Director-General, and so it was his letter dated 4 May 1981 that constituted his final decision. As to the merits, the complainant points out a discrepancy between the English and Spanish versions of Article LS II 5.05 and submits that it is the Spanish which prevails: this text authorises dismissal required by "functional needs" and she enlarges on her contention that no such needs justified her own dismissal. She again observes that the ESO has been recruiting local staff and contracting out work. Her functions are now being performed by three officials, whom she names. As to the period of notice, Article R II 6.02 distinguishes between notice and compensation for termination of contract. In fact she got no notice at all. It is not true to say that she was not a member of the AUPL Council in 1979, and she appends the text of a letter addressed to the Director-General on 25 May 1979 which she submits proves that she was. Besides, in serving on the salary committee she was engaged in the "performance of Staff Association duties", the term in Article R VII 1.06. That committee is not an informal working party within the AUPL but a joint body set up by an agreement of 19 July 1978 between the Director-General and the AUPL. As to the claim in respect of social security contributions, the ESO is bound, as it has itself acknowledged, to apply Chilean law on social security. As to the claim to retroactive salary adjustments, while rejecting the contention that it is premature, the complainant acknowledges the ESO's willingness to grant her

the adjustments.

E. In its surrejoinder the ESO observes that there is no substantive difference between the Spanish and English versions of Article LS II 5.05: under both versions the dismissal was justified, and the ESO gives a further explanation of its financial situation. There is no merit in the arguments about new recruitment and the contracting out of work. The workload of the complainant's branch in Santiago having greatly diminished, it was a simple matter for the residue of her functions to be absorbed by the remaining staff. While it is true that she was a member of the AUPL Council she was never one of the members of the directorate, the only staff members who enjoy the protection of Article R VII 1.06. Membership of a salary committee, whether a working party of AUPL or a joint body, cannot confer any privilege. As to the claim for social security contributions, the contention that the ESO must comply with Chilean law betrays confusion between the policy of applying the law of the host State and an obligation to do so. The ESO again invites the Tribunal to declare the complaint irreceivable or, if receivable, devoid of merit.

CONSIDERATIONS:

This complainant was dismissed by the organisation in the same circumstances and for the same reasons as the two complainants in the case of Azola Blanco and Véliz García, Judgment No. 507. Her claims for relief are the same and except upon one point noted below the statement of facts and arguments which she has submitted to the Tribunal is the same.

The only point of difference in her statement of facts is that she relies upon an additional ground of complaint in respect of her dismissal. She claims that as she was a member of the Council of the Staff Association she is entitled to a degree of immunity under Article R VII 1.06 of the Staff Regulations which prescribes that before any official of the Association is dismissed owing to the suppression or abolition of a post or a reduction in total staff the Director-General shall consult the Joint Advisory Appeals Board. Since the Tribunal considers her dismissal to be unjustified for the reasons which it has given in Judgment No. 507, there is no need to consider this point. For this reason, and for those set forth in Judgment No. 507 the complaint is allowed as indicated in the decision below.

DECISION:

1. The decision of the Director-General dated 4 May 1981 is quashed.

2. The Tribunal, finding reinstatement to be impossible or inadvisable, orders that the organisation pay to the complainant as compensation for wrongful dismissal a sum equal to three times the total gross remuneration paid to her in respect of the period 1 March 1980 to 28 February 1981 and as improved by any retroactive adjustment granted by the organisation.

3. It is ordered that the organisation shall ascertain the sum which ought to have been contributed to the National Social Security System in respect of the aguinaldos paid to the complainant in December 1980 and shall further ascertain the amount of such contribution which should have been provided by the organisation and the amount which the organisation should have deducted from the complainant's monthly remuneration: if the former be found to exceed the latter, the organisation shall pay the excess to her.

4. All the sums payable as above shall bear interest at the rate of 12 per cent per annum from the date of the complaint.

5. The organisation shall pay US$1,000 to the complainant as costs.

6. All her other claims 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 3 June 1982.

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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