

## SIXTIETH ORDINARY SESSION

In re JUTZI

Judgment No. 783

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Christian Jutzi against the European Southern Observatory (ESO) on 13 February 1986, the ESO's reply of 7 May, the complainant's rejoinder of 7 July and the ESO's surrejoinder of 22 July 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles R VI 1.01 and 1.04 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 facts of the case and the pleadings may be summed up as follows:

A. The ESO has an observatory for astronomical research at La Silla in the Chilean Andes. The complainant, a Swiss citizen, took up duty in the ESO's administrative office in Chile, which is in Santiago, on 1 September 1984 under a three-year contract. His duties included the supervision of customs clearance for goods imported from abroad by ESO staff and liaison with the Chilean Government.

An international staff member was allowed to import a motor car free of tax every two years and sell it in Chile with permission from the Ministry for Foreign Affairs and on payment of reduced duties; after three years he might sell it without any restriction at all.

In December 1984 Mr. Bosker, a Dutchman in charge of storage and transport for the ESO in Chile, imported a new Mercedes Benz motor car, a 500 coupé, valued at some 28,000 United States dollars. In January 1985 he applied to the Ministry for exemption from customs duties. On 22 January the complainant wrote seeking guidance from the Head of Administration at headquarters, saying that the practice of importing cars was causing "uneasiness" in the Ministry. He went up to La Silla. There the Head of Administration told him on the telephone on 25 January not to approach the Ministry on the matter. In a letter of the same date the Ministry refused the exemption for Mr. Bosker. On 31 January, while the complainant was still at La Silla, a telex was sent from there to Santiago instructing that the Ministry be asked to reconsider and a memorandum to that effect was handed in at the Ministry on the same date. While on a visit to Santiago in July 1985 the Head of Administration came upon a copy of the memorandum. In a letter of 26 July to the complainant he said it had been sent in breach of "the instructions given to you in a telephone conversation at the time" and called him to account. In answer the complainant addressed a minute to the Director-General's representative in Santiago on 20 August. The ESO's Legal Adviser arrived the same day to make inquiries. He went to La Silla on 27 August. Back in Santiago on the 28th he put to the complainant, in terms that are in dispute, the possibility of resignation. On the 29th the complainant handed the Legal Adviser two letters to the Director-General: one offered his immediate resignation "for strictly personal reasons"; the other denied he had sent the telex from La Silla on 31 January. On 2 September 1985 he appealed to the Director-General under Article R VI 1.01 of the Staff Regulations alleging that he had resigned under duress. On 13 September the Head of Administration wrote letters to him accepting his offer of resignation and to his counsel observing that resignation did not constitute a challengeable decision. On 8 October he lodged another appeal alleging coercion and threats by the Legal Adviser and challenging the acceptance of his resignation and, subsidiarily, the decision not to pay him after 30 September 1985. He claimed a period of notice of termination up to 30 November and other benefits. In a letter of 13 November, which reached him on 3 December and is the decision impugned, the Director-General said that, there being no challengeable decision, his appeal was rejected.

B. The complainant gives in detail his own version of the facts. He avers that he never authorised the sending of the telex from La Silla; that the copy of the draft telex obtained by the Legal Adviser bore handwriting forged to look like his own; that the evidence that cast suspicion on him was false; and that he was innocent of any dishonest act or intention. He submits that the Legal Adviser put pressure on him by threatening him with summary dismissal

and loss of all his entitlements and benefits, that he resigned under duress and that there has been a grave miscarriage of justice. He seeks reinstatement or, failing that, payment of his full entitlements up to the date of expiry of his contract of employment, 31 August 1987, and in any event costs amounting to \$3,000.

C. The ESO replies that the complaint is irreceivable because, not having filed his appeal in time, the complainant failed to exhaust the internal means of redress. Article R VI 1.04 requires appeal within 30 days. Since he resigned on 29 August 1985, and supposing that that was a decision, he should have appealed by 28 September; not until he made his appeal of 8 October did he first allege coercion. Moreover in his complaint he claims reinstatement, whereas in his appeal of 8 October he sought only the grant of three months' notice: in that respect, too, he has failed to exhaust the internal means of redress.

In any event the complaint is devoid of merit. It is plain from the evidence that coercion cannot have been the real reason for his resigning. The burden of proof is on him, and he has failed to discharge it. His allegations of threats by the Legal Adviser are implausible: the Staff Rules and Regulations prescribe a procedure and allow only suspension from duty with pay during disciplinary inquiry. With his administrative experience he must have known that the threats even supposing they were made, were idle. The Legal Adviser obtained in Chile written and oral evidence which showed that the complainant had disobeyed instructions from headquarters, sent the Ministry the memorandum and disposed of papers revealing his part in the affair. The ESO describes that evidence and appends texts in support of its charges against him. It submits that he was guilty of serious mismanagement and professional misbehaviour warranting disciplinary action. Reinstatement would for that reason be out of the question even if the Tribunal allowed his complaint.

D. In his rejoinder the complainant argues that his complaint is receivable. He observes that his appeal of 2 September 1985, submitted only four days after he resigned, plainly stated he had been subjected to moral coercion and given wrong advice. His case should have been referred to the Joint Advisory Appeals Board. He took every step he could to have the case thoroughly looked into, and he exhausted the internal means of redress.

As to the merits, he objects to some features of the ESO's version and in particular its Legal Adviser's findings, which he believes to contain some distortions, and again submits that he resigned under duress.

E. In its surrejoinder the ESO points out that under Article R VI 1.01 of the Rules internal appeals may be made only by members of the staff -- which the complainant had ceased to be -- and against decisions -- which his resignation was not.

As to the merits, it observes that he largely accepts its account of the facts and puts forward no new arguments.

#### CONSIDERATIONS:

1. There was an inquiry to establish whether or not, contrary to his superior's instructions, the complainant had sent the telex of 31 January 1985 from La Silla to the ESO's office in Santiago asking it to approach the Chilean Ministry of Foreign Affairs to reconsider and allow exemption from tax on Mr. Bosker's car and had on the same day sent a memorandum asking the Ministry to do so.

2. The inquiry was carried out by the ESO's Legal Adviser, Mr. Kunz-Hallstein, a member of the Munich Bar, who was sent out specially to Chile by the Director-General from headquarters.

3. On 28 August 1985 Mr. Kunz-Hallstein and Mr. Urrutia one of the ESO's legal advisers in Chile, had a meeting with the complainant. They informed him that from written and other evidence collected by Mr. Kunz-Hallstein in Santiago and at La Silla it was suspected that it was he who had given the instruction to send the memorandum to the Ministry, that he had suppressed documents showing his involvement; that the ESO would start disciplinary action against him, but that it would accept his resignation if he preferred to resign. He said he would seek advice from his lawyer.

4. On the same day Mr. Kunz-Hallstein had a meeting with the complainant's lawyer, Mr. Ugarte of the Santiago Bar. Also present were Mr. Urrutia and Mr. Valenzuela, another legal adviser of the ESO in Chile. Mr. Ugarte was told the result of Mr. Kunz-Hallstein's inquiries and shown documents implicating the complainant. After inspecting them he said that he would advise the complainant to resign.

5. On 29 August the complainant presented to the ESO's Legal Adviser his letter of resignation, which was to take

immediate effect. The first paragraph reads:

"For strictly personal reasons, I herewith see myself in a position to submit my resignation as Administrator of ESO-Chile with effect from today on."

6. In a telephone conversation on the same day Mr. Kunz-Hallstein orally accepted the resignation on behalf of the Director-General. On 13 September Mr. Bachmann, the Head of Administration, wrote from headquarters formally confirming acceptance.

7. The Director-General did not dismiss the complainant or terminate his appointment. The decision to resign was his own, and there is no decision by the Director-General against which he may appeal to the Tribunal.

8. The complainant argues that he resigned under duress. The Tribunal rejects the plea. He had sufficient time to consult a lawyer of his own choice and one in whom he had confidence and to consider his advice. It is clear that his letter of resignation was written on independent legal advice. The letter cited "strictly personal reasons". The resignation was unconditional and was to take effect immediately. It made no mention of duress.

9. Mr. Kunz-Hallstein and Mr. Urrutia denied that the complainant was threatened with immediate dismissal. Actually neither of them had any authority to make such a threat. The complainant was merely informed that Mr. Kunz-Hallstein's findings would be passed on to the Director-General for a decision and that most probably disciplinary proceedings would be started.

10. Since the Tribunal dismisses the complaint on the grounds stated above, it need not rule on the Observatory's objections to receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner