**SIXTY-THIRD SESSION**

# *In re* MISCHUNG (No. 4)

**Judgment 842**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Norbert Mischung against the European Southern Observatory (ESO) on 13 May 1987 and corrected on 6 June, the ESO's reply of 15 July, the complainant's rejoinder of 17 August and the ESO's surrejoinder of 14 September 1987;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal, Article I 4.01 of the ESO Staff Rules and Article R VI 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. By a letter of 5 September 1984 the complainant informed his then employer, the ESO, that on 27 July he had invented monolithic mirror blanks to be used in large telescopes, that he believed his invention to be patentable and that, while on leave in August, he had been working on a draft application to the Patent Office of the Federal Republic of Germany for a patent. At about the same time he engaged the services of a patent attorney who drew up an application for him. In mid-October 1984, however, the ESO asserted its rights to the invention and decided itself to apply to the Patent Office. The complainant handed over the material prepared by his patent attorney and the ESO's patent lawyer made use of it in making its own application. On 8 February 1985 his counsel wrote to the ESO's legal adviser claiming repayment of a bill for 8,778 Deutschmarks from his patent attorney which he himself paid on 21 February. The legal adviser refused in a letter of 22 February to his counsel. The complainant repeated the claim again in a letter he wrote to the Director General on 15 June 1986. In a reply of 13 October the Head of Administration again refused his claim, pointing out that there had been "no request from ESO's side to prepare a legal document or a legal application for a patent". He pressed his claim in a letter of 29 October and on 17 November the Head of Administration confirmed the earlier refusals. On 1 December he lodged an appeal against the letter of 17 November.

In Judgment 780, on 12 December 1986, the Tribunal dismissed the complainant's first complaint. As is related in Judgment 840 on his second complaint, under A, the parties then started negotiating a settlement. The complainant was to sign an undertaking to withdraw his second complaint and to waive all other claims, save as to health insurance and pension rights, in return for two things: a testimonial - a matter that was later to prompt his third complaint - and repayment of the 8,778 Deutschmarks. But by a letter of 26 February his counsel informed the legal adviser that he refused the terms of settlement. That is the date on which he says he notified the claim to the Administration and he is challenging the implied rejection of it.

B. The complainant says that in mid-1984 his supervisor asked him orally to draft papers that would serve in applying for a patent. He spent three months in office hours doing so, and the ESO would not have put up with that had the drafting not been in its own interest. It knew full well and indeed has never denied that he was getting help from a patent lawyer. All that its own patent lawyer did was file the formal application. He is therefore entitled to have back what he spent on getting the papers drafted. The ESO has been unjustly enriched. He asks the Tribunal (1) to order the ESO not to forbid the making of further claims; (2) to declare that it has been unjustly enriched and to award him (3) the 8,778 Deutschmarks and 300 DM, the cost of 11 motor journeys to see his patent lawyer, (4) interest on those sums as from 21 February 1985 and costs.

C. In its reply the ESO submits that claim (l) is irreceivable because the complainant is not impugning any express or implied decision within the meaning of Article VII of the Statute of the Tribunal and has not exhausted the internal means of redress. His claim merely arises out of one of the terms of the proposed settlement. Besides, it is devoid of merit: there is nothing unlawful about asking someone in negotiation to refrain from making further claims.

Claim (2) is irreceivable because it does not seek a remedy within Article VIII of the Statute.

Claim (3) is irreceivable because the ESO's decision not to reimburse the cost of the patent lawyer's services was conveyed in its legal adviser's letter of 22 February 1985 to his counsel, and he did not challenge that decision within the one-month time limit set in Article R VI 1.04 of the Staff Regulations. Even if the ESO's letter of 13 October 1986 was not confirmatory but treated as a new decision giving rise to a new time limit, he still failed to challenge it, not by an internal appeal, since he was no longer on the staff, but by filing a complaint with the Tribunal within the prescribed time limits. The negotiations did not give rise to any new time limit.

Claim (4) is irreceivable because it is a new one.

Claims (2), (3) and (4) are also devoid of merit. The complainant engaged his patent attorney without the ESO's authority or even knowledge. What his supervisor asked him for was a technical report on his invention, and he had a duty to hand over his report to the ESO. He would not have run up any expense at all had he done what the ESO had told him. The mere belief that what he did was in its interests put it under no obligation. In any case it could not have asked him in mid-1984 to draft papers for an application since not until October 1984 did it decide to assert its rights and to make one. The fact that its own patent lawyer used the papers is immaterial: he still had to take responsibility for the application as filed and therefore review the papers.

D. In his rejoinder the complainant seeks to correct what he sees as misrepresentations in the ESO's narrative, particularly as to the negotiations. He submits that the ESO has failed to rebut his charge of unjust enrichment and that its over-formal objections to receivability are typical of its bureaucratic style of management. Observing that it does not even deny it made use of papers he himself paid for, he presses his claims.

E. In its surrejoinder the Observatory contends that it is the complainant's account of the negotiations that is distorted. It develops its main plea on the merits of the claim to reimbursement, observing that the complainant had no authority to engage a patent lawyer on its behalf and that his supervisor asked him no more than to draft technical papers about his invention: it was his own choice to submit instead an application drawn up by his own patent lawyer.

CONSIDERATIONS:

1. The complainant joined the staff of the ESO on 1 November 1981 as a senior engineer on a project involving the maintenance of a large telescope at La Silla in Chile. He said that on 27 July 1984, during the course of his official duties, he had invented a cost-saving method of fabricating large high-

precision monolithic mirror blanks for telescopes and other equipment. Under the provisions of Article I 4.01 of the ESO Staff Rules all rights, including patent rights arising from the invention, shall be vested in the ESO at its request. In March 1985 the complainant appealed to the Joint Advisory Appeals Board against the refusal by the ESO to acknowledge that he was entitled to adequate compensation. The Board rejected his appeal and he filed his case with the Tribunal. In Judgment 780 the Tribunal held that the ESO was entitled to use the invention of the complainant, its employee, and to use it outside member countries, and that the complainant was not entitled to any patent rights over his invention nor to any compensation.

In his present complaint the complainant asks the Tribunal:

(a) to declare that the ESO is not entitled to seek from him an undertaking not to file any further appeals against the ESO in future;

(b) to declare that the ESO has been unjustly enriched;

(c) to order the ESO to reimburse all costs, with interest, incurred by him in connection with the elaboration of the patent application document used by the ESO.

Receivability

2. As to claim (a) above, the complainant neither challenges a decision nor alleges an omission on the part of the ESO to take a decision on any claim which he has made in respect of the matter on which he seeks relief. The claim is therefore irreceivable.

As to claim (b) the same reasoning applies and it, too, is irreceivable.

As to claim (c) the complainant first sought on 8 February 1985 to have the ESO acknowledge the costs incurred by him in preparing the patent application, especially the patent attorney's fee of 8,778 DM. The Observatory rejected the claim on 22 February 1985. But it entered into further negotiations with the complainant, and on 4 August 1986 the Head of Administration wrote to the complainant stating that enquiries were being made into the request for the reimbursement of 8,778 DM. On 13 October 1986 the Head of Administration, in dealing with the complainant's termination arrangements, stated that the Observatory found it difficult to justify the reimbursement. On 17 November 1986 the Head of Administration further wrote that there was no reason to change the ESO's previous decision. On 1 December 1986 the complainant appealed against the decision notified in the letter of 17 November 1986.

The filing of the appeal, however, did not put an end to the negotiations. On 4 February 1987 the ESO offered to settle the matter by reimbursing to complainant the sum of 8,778 DM and issuing the draft performance assessment subject to certain amendments in consideration of his withdrawing his second complaint before the Tribunal and declaring that all claims arising from his employment had been settled and he would raise no further claims. In the light of these facts it would appear that neither the ESO nor the complainant regarded the letter of 13 October 1986 as conveying the final decision as to the reimbursement of the sum claimed. For this reason the objection to the receivability of claim (c) fails.

The merits

3. It is conceded in the complainant's rejoinder that he consulted his patent attorney on a date following 27 July 1984 and before informing the ESO officially of his invention. His purpose in doing so was to get advice on the invention itself and on its patentability. On his patent attorney's advice he started to prepare the papers for a patent application in case the ESO did not itself wish to do so. On 5 September 1984 he informed his superiors of his invention of 27 July 1984 and indicated that he wished to co-operate with the ESO to maintain its "legal and fee interests" as well as his own. On 15 October 1984, in accordance with the provisions of the rules, the ESO claimed all rights arising from the invention.

The complainant's submission is that the ESO knew of his contacts with the patent attorney and had the benefit of the papers prepared with the patent attorney's help. That the Observatory knew does not make it liable. Its patent attorney may have made use of the papers but that is immaterial to the issue in dispute between it and the complainant. The fact remains that he retained the patent attorney on his own initiative and in his own interest, and without any authorisation from the ESO. That being so, the ESO is not under any legal obligation to reimburse to the complainant the amount of fees he contracted to pay the patent attorney.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December1987.

(Signed)

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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