

SIXTY-THIRD SESSION

In re YAGNAM VIGORENA

Judgment 872

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jorge Fernando Yagnam Vigorena against the European Southern Observatory (ESO) on 17 December 1986, the ESO's reply of 9 February 1987, the complainant's rejoinder of 6 March and the ESO's surrejoinder of 29 April 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles I 3.04, II 5.01 and II 5.02 and Annex SB 1 of the ESO Combined Staff Rules and Articles LS II 4.01, 4.02, 5.03, 5.04 and 5.08, LS V 1.04 and 1.09, LS VI 1.01, 1.05, 1.07 and 1.08 and Articles 1.01 and 1.02 of Annex A3 of the Local Staff Regulations and Staff Rules of the ESO;

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 astronomic observatory at La Silla in the Chilean Andes, several hundred miles north of Santiago. Thirty-odd international staff members live and work there, and over a hundred local ones. The complainant, a Chilean born in 1946, began in 1977 as a night assistant at La Silla under a temporary appointment. Two years later he got an indefinite contract, and it was subject to the Local Staff Regulations.

A former staff member and other creditors of the complainant asked the ESO to see that he paid off his debts. It made him interest-free loans for the purpose. His creditors started penal proceedings against him in the Chilean courts for issuing bad cheques and police turned up at the ESO compound at La Silla to arrest him. A written reprimand imposed on him on 26 June 1985 under LS II 4.02 said that he would be dismissed if he again entangled the ESO in his private financial affairs. He was admonished in a letter of 9 April 1986 when the ESO learned that criminal charges still lay against him. Police went to the compound again on 14 July 1986 to arrest him for fraud, and in a talk with him on that day the Director of the ESO in Chile told him that he would be dismissed if he did not resign. The same day he left La Silla, without permission, and went down to Santiago. On the morrow he gave the ESO's office there a medical certificate saying that he would be off work until 28 July. On 18 July the Director wrote to him in Santiago to say that he would be dismissed with effect from 18 August under LS II 4.01, which prescribes "disciplinary measures"; LS II 4.02, which says they include termination; and LS II 5.04(2), which allows termination on grounds of "lack of probity, battery, insults or serious immoral conduct duly proven". Since 1982, explained the Director, he had betrayed private financial commitments; the ESO had helped him out several times, but to no avail; he had broken faith time and again despite many oral warnings and the written reprimand of 26 June 1985; and he had disobeyed an order the ESO had given him on 14 July 1986 to account for his conduct by the next day. He was told not to go back to La Silla.

Writing from Santiago on 11 August, the complainant lodged an appeal with the Director under LS VI 1.05. In his reply of 3 September the Director rejected his appeal; he wrote to the Director General at headquarters near Munich; and by a letter of 13 October 1986 the Director General upheld the rejection: "... your acts are incompatible with your function as a staff member of an International Organisation and highly prejudicial to the interests of ESO. Indeed, they affect directly the relations between ESO and its host state". That is the decision impugned.

B. The complainant submits (1) that the dismissal was unlawful. The ESO punished him twice for the same alleged offence: it dismissed him, and it withheld the indemnity ordinarily payable on termination of contract. (2) Where the employee is found innocent of charges against him the dismissal will be wrongful if based on those charges. Since a municipal court at La Serena, in Chile, acquitted him on charges of financial impropriety the ESO's case fails: he has not done anything that directly affects relations between the ESO and the host state. (3) A staff member should be given a hearing before being disciplined. A Joint Advisory Disciplinary Board has been set up under Annex SB 1 of the Combined Staff Rules, and SB 1.03 says that whenever the Director in Chile considers

disciplinary action he shall convene the Board. In this case he did not do so. (4) Chilean social security law applies to local staff in Chile because the ESO has embodied Chilean legislation on the subject in its own rules. The medical certificate of 15 July 1986 prescribed a fortnight's sick leave for the complainant and it was in breach of Chilean law to dismiss him during the fortnight. He seeks reinstatement and payment of salary from 18 August 1986 up to the date of reinstatement; subsidiarily, compensation equivalent to six years' gross pay plus interest at 12 per cent a year from the date on which he filed the complaint; or, failing that, the service indemnity prescribed in Article 1.01 of Annex A3 to the Local Staff Rules. He claims costs.

C. In its reply the ESO submits that there was no procedural flaw. (1) The disciplinary procedure laid down in Article LS II 4 of the Local Staff Regulations does not say that the staff member shall be given a hearing before disciplinary action is taken. Besides, the complainant was given a hearing at the interview the Director had with him on 14 July 1986. (2) Though LS VI 1.08 empowers the Director General to appoint a committee to advise him on "specific cases of disputes and appeals", he has discretion in the matter. In this case the Director saw no need to set up an advisory committee because the facts were not in dispute and the complainant had been given ample warning. (3) There is nothing in ESO rules to preclude imposing during sick leave a penalty for an offence committed earlier. Chilean law is irrelevant, and anyway would not rule out dismissal in such circumstances.

The decision is sound in substance. Article I 3.04 of the Combined Staff Rules forbids the staff member any act that is incompatible with his functions or prejudicial to the ESO and adds that the Director-General shall be "the sole authority to decide" whether an act is incompatible or prejudicial. The constant indebtedness of a staff member harms the ESO's repute, especially when warrants go out for his arrest, and shows "lack of probity" within the meaning of LS II 5.04. The complainant has failed to submit the text of the judgment by the Chilean court. Besides, even if acquitted of fraud, he has still besmirched the ESO's good name and the grounds for dismissal hold good. Dismissal was in proportion to his offence.

Had he resigned he would have kept his service indemnities. Instead he lost them under Article 1.02 of Annex A3: "No indemnity shall be paid in case of dismissal for disciplinary reasons as defined in Article LS II 5.04".

D. The complainant rejoins that like many Chileans he suffered the consequences of his country's severe economic recession in 1982: his debts soared because of the collapse of its currency. As the ESO knows full well, his conduct was honourable; that is why it helped him and why he was acquitted of fraud. After years of forbearance it unpredictably became severe.

At his interview with the Director on 14 July 1986 he was not given a hearing but an ultimatum.

He was dismissed on the wrong assumption that he lacked probity and the sanction was in any event disproportionate to the alleged offence.

E. In its surrejoinder the ESO enlarges on its case and again asks the Tribunal to dismiss the claims as devoid of merit. Other Chilean staff managed to survive the recession without bringing it into disrepute. It never condoned the complainant's misbehaviour, but tried to help him only in the hope that his conduct would improve. It acted firmly only when that hope proved vain.

The decision of the Chilean court is immaterial because it was not the bringing of charges against the complainant that prompted his dismissal.

CONSIDERATIONS:

1. By a letter dated 18 July 1986 the complainant was dismissed with effect from 18 August 1986. He was informed, in compliance with Article LS II 5.03 of the Local Staff Regulations and Staff Rules, that the reasons for his dismissal were based on LS II 5.04(2). This article provides that "the reasons for dismissal of a local staff member can be the following: ... (2) lack of probity, battery, insults or serious immoral conduct duly proven". The letter did not specify which of these grounds was applicable but set out in detail the complainant's history in the organisation.

2. The complainant appealed against his dismissal under LS VI 1.01 to the Director of the ESO in Chile, who confirmed it. He then addressed an appeal to the Director General, who rejected it under LS VI 1.07 by a letter dated 13 October 1986. It is this decision the Tribunal must consider.

3. The complainant submits on four grounds that he has been wrongfully dismissed:

(1) that the organisation has inflicted two disciplinary sanctions, viz. dismissal and a deprivation of indemnity contrary to LS II 5.08, for the same alleged offence;

(2) that since the admissible grounds for dismissal in LS II 5.04(2) were taken verbatim from Chilean law the article must be interpreted according to that law, and that since the proceedings were discontinued in October 1986 by a court of La Serena he never committed any act affecting directly relations between the ESO and the host State;(3) that the Director General failed to consult a joint committee as required by LS VI 1.08; and

(4) that the organisation was wrong to dismiss him when, having presented a medical certificate, he was on sick leave.

The first plea

4. LS II 5.08 provides: "Indemnities or grants payable on termination of contract are calculated according to the scales and terms given in Annex A3". But Article 1.02 of Annex A3 says that "No indemnity shall be paid in case of dismissal for disciplinary reasons as defined in Article LS II 5.04".

Since, as stated below, the complainant's dismissal is justified under LS II 5.04(2), the first plea fails.

The second plea

5. By virtue of LS V 1.04 and 1.09 the Tribunal has appellate jurisdiction in the interpretation of the Staff Rules. A decision by a national court cannot be binding on the Tribunal, which is the body of final instance competent to interpret the Staff Rules as an issue of law.

6. When an appeal is made to the Director General under LS VI 1.07 from a disciplinary decision taken under LS II 4.01 his function is to decide whether the reasons given for that decision are valid. It is not, as he did, to add new reasons. But the Director General's letter does confirm the reasons already given and the Tribunal must consider whether on the merits any one of the grounds set out in LS II 5.04(2) is established.

7. LS II 5.04(2) sets out four grounds: lack of probity, battery, insults or serious immoral conduct duly proven. They are alternatives.

8. In the circumstances of this case the Tribunal considers that lack of probity is the relevant ground. The complainant's failure to resolve his financial difficulties within a reasonable time despite assistance from the organisation demonstrated a lack of probity that was incompatible with his position as an international civil servant. It led directly to the organisation's continued involuntary involvement in his personal affairs to an intolerable degree and, in the Tribunal's opinion, fully justified his dismissal. The fact that the court of La Serena later discontinued the proceedings against him does not affect the lawfulness of the decision.

The third plea

9. The complainant maintains that the Director-General failed to consult a joint committee under LS VI 1.08, which provides: "The Director General may appoint a Committee which includes Local Staff Members to advise him on specific cases of disputes and appeals".

10. The power thus given to the Director General is discretionary. He decided in this case that it was not necessary to appoint a committee to advise him; no reasons have been advanced why his decision should be overruled and it therefore stands unchallenged.

11. The ESO appears in its reply to have read into this plea an additional complaint that it failed to give the complainant a hearing. That is clearly not so as the complainant was interviewed on 14 July and was given an opportunity to return with any relevant documents.

The fourth plea

12. The complainant's fourth plea is that the organisation was in breach of the obligations imposed on Chilean

employers under Chilean social security law by dismissing him when he had produced a medical certificate and was therefore on sick leave.

13. The plea fails. For one thing, Chilean social security law does not apply to staff of the ESO, which is not subject to national law. For another, the complainant cites no decision to put him on sick leave: his merely producing a medical certificate is not the same thing.

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 Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

Jacques Ducoux
Mella Carroll
H. Gross Espiell
A.B. Gardner