

SIXTY-EIGHTH SESSION

In re MAUGIS (No. 2)

Judgment 996

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Michel Maugis against the European Southern Observatory (ESO) on 13 December 1988 and corrected on 16 December, the ESO's reply of 21 February 1989, the complainant's rejoinder of 26 April and the Observatory's surrejoinder of 29 May 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article VI 1.01 of the ESO Staff Rules and Articles R II 1.15, 1.24, 5.02, 5.04, 6.01, 6.11 and 6.12, R VI 1.01 and 1.03 and R VII 1.06 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 complainant, a French citizen born in 1946, joined the staff of the Observatory on 1 October 1979. He was assigned as an electronics technician at grade 8, step 1, to the organisation's astronomic observatory at La Silla, in the Chilean Andes. His appointment was for three years. His supervisor, the head of the Technical Research Support Department (TRS), praised his performance and he had his appointment extended by three years to 30 September 1985. On 1 January 1984 he was promoted to grade 9, step 3. He was in charge of the electronics group of TRS. He was granted an indefinite appointment as from 30 August 1984. His work continued to rate well and by 1 January 1987 he had reached step 6 in grade 9.

He was elected staff representative on the Standing Advisory Committee - a joint body - in January 1986, to a local committee for international staff in July 1986 and to the Joint Advisory Disciplinary Board in June 1987.

There was a dispute between the complainant and his supervisor at a meeting of TRS in April 1987. On 15 April his supervisor imposed a written reprimand on him under Article R II 5.04 of the ESO Staff Regulations on the grounds of his "intolerable" behaviour and replaced him as head of the electronics group. He answered the reprimand in a letter of 23 April.

On 9 June 1987 a bus conveying staff between La Silla and the local ESO office at La Serena was in an accident and 29 people were hurt. The Director-General set up a transport safety committee, and the complainant was elected chairman of it in July 1987.

In a letter of 16 December 1987 the Head of Administration wrote from headquarters at Garching, in the Federal Republic of Germany, to tell him that the step increase in salary due to him from 1 January 1988 would be withheld, at his supervisor's recommendation, on the grounds of a decline in his performance and sense of commitment and his disruptive and "conflictive" attitude. He wrote to the Director-General on 24 February 1988 asking for review of that decision.

In a further letter, dated 28 December 1987, the Head of Administration had told him that for months his conduct had made for tension at work and in accordance with R II 1.24*(* The text provides that "... with his agreement [a staff member] may also be called upon to assume duties at another duty station. In this case, if [he] does not feel able to accept the proposed transfer and prefers a termination of contract, then indemnities shall be paid as though ESO had terminated the contract".) he was to be transferred to headquarters. He was in Europe at the time and talked things over with the Director-General and the Head of Administration at headquarters on 3 February 1988. Back at La Silla, he wrote on 11 February to say that though he accepted the transfer he objected to the reasons for it and to not having been given his say beforehand; moreover, the Director-General himself had not taken the decision. The Head of Administration answered him in a detailed letter of 22 February which concluded with an order to report for duty at headquarters on 1 June. He repeated his objections in a letter of 1 March. In his reply of 29 March the Head of Administration confirmed the decision, which he said was the Director-General's, and called

for unequivocal acceptance of it. The complainant wrote on 13 April reaffirming that though he did not agree with the decision he could accept the transfer. By a letter of 19 April the Director-General ended his contract under R II 1.24, giving him six months' notice under R II 6.11 - so that he would leave on 31 October 1988 - and putting him on paid leave under R II 6.12.

On 13 May the complainant appealed under Articles VI 1.01 of the Staff Rules and R VI 1.03 of the Staff Regulations. In its report of 2 August 1988 the Joint Advisory Appeals Board held that R II 1.24 was unclear and in any event could not apply to his case; it recommended reinstating him. By a letter of 7 September 1988, which he got on 14 September and now impugns, the Director-General rejected the Board's recommendation and his appeal.

B. The complainant gives his account of the facts, observing that his case drew protest from the staff associations. Though he accepted the transfer he could not agree to it as such since it was really a disciplinary sanction for the alleged making of trouble at La Silla.

He was given no chance to answer his supervisor's charges before the transfer was decided on. By February 1989 that decision had already been taken, and the discussions that took place at headquarters early in that month and later were only about how to carry it out. The ESO did not want him to know that his transfer had been dictated, not by its true interests, but by the hostility his espousal of staff causes had aroused in his supervisor. Signs of that hostility were the unwarranted reprimand, his replacement as group leader and the withholding of his increment. As a covert disciplinary sanction ordered for improper reasons the transfer was an abuse of authority.

Even if his replies might be taken as refusal of the transfer, such refusal did not warrant termination. The meaning of Articles R II 1.15 ("Any change in the conditions set out in the contract shall require an amendment accepted by both parties") and R II 1.24 of the Staff Regulations is obscure, and in any event refusal of transfer is not one of the reasons for termination stated in R II 6.01.

The termination, too, was disciplinary action in disguise. That is plain from a minute of his supervisor's of 4 March 1988 which the Administration submitted to the Appeals Board and which sets out grave but unfounded charges against him. Had the ESO thought the charges true it would have followed the disciplinary procedure, as indeed it should have done; but it dared not risk rejection of them by the Joint Advisory Disciplinary Board. The complainant was denied due process.

The termination was, moreover, in breach of R VII 1.06: "The performance of Staff Association duties shall not affect careers or disciplinary measures ...". The ESO's real purpose was to get rid of someone whom, though his record was good, it found too militant a staff representative. There was also a procedural flaw in that according to the same article "the Director-General shall consult the Joint Advisory Appeals Board" when a staff representative is dismissed.

The complainant asks the Tribunal to declare the transfer void as an abuse of authority and breach of the safeguards enjoyed by staff representatives and therefore set aside the decision of 19 April 1988 and order his reinstatement in his former post; subsidiarily, to award him damages equivalent to the sums he would have earned from 1 November 1988 up to the date of the Tribunal's judgment and damages for future loss of pay. He claims a further sum in moral damages and an award of costs.

C. The ESO gives its own version of the facts. It says that in 1986 the complainant's behaviour became aggressive and insulting and his work poor. By early 1987 he was not fit to lead his group and later could not even be kept on at La Silla. The Director-General took the view that the best way to ease the tension was to transfer him to headquarters, where he could work on an important new project.

The ESO understood at first from discussion with him that he accepted the transfer, which indeed he never appealed against, even though he disagreed with the reasons for it. But since his letter of 1 March 1988 said he wanted to stay on at La Silla the ESO asked for his unequivocal acceptance. His letter of 13 April 1988 did not give it but actually said he did not agree to taking up duty elsewhere; so there was nothing for it but to end his contract. He has already been paid over 133,000 Deutschmarks in termination indemnity and will get nearly another 30,000 if he did not find employment within ten months of leaving the ESO.

His objections to the transfer are irreceivable because he failed to exhaust the internal means of redress, as Article

VII(1) of the Tribunal's Statute requires. Besides, they are devoid of merit. The ESO did consult him since he gave his consent in the discussions at headquarters in February 1988 and repeated it in his letter of 11 February. The transfer was not a covert sanction: transfer is not a punitive measure, and the Director-General was making proper exercise of his discretion in the circumstances.

The decision to terminate the complainant's contract was also sound, being prompted by his refusal to accept the transfer and based on a proper interpretation of R II 1.24. It would be absurd if the staff member could thwart the Director-General's will by refusing consent: all the article means is that only the actual arrangements for giving effect to the decision, not the decision itself, need consent. The staff member may not "accept" transfer and then refuse his "agreement" to it. That interpretation is in line with the case law and the nature of international service. Had the complainant's objections to the transfer been professional or personal they might have been acceptable; instead they were based on a misreading of the rules.

The fact that refusal of transfer is not one of the reasons for termination stated in R II 6.01 does not preclude termination under R II 1.24, which would otherwise be meaningless.

There was no abuse of authority because the transfer was not a disciplinary sanction and had nothing to do with the complainant's staff activities: the purpose of it was to sort out a problem at La Silla.

Lastly, R VII 1.06 requires consultation of the Joint Advisory Appeals Board only if a staff representative is dismissed on the grounds of unsuitability or redundancy. The complainant was not.

D. In his rejoinder the complainant further discusses the facts he sees as material, his staff work, the duties he was to perform at headquarters, and the meaning of R II 1.24. He enlarges on his original pleas and seeks to refute the ESO's. He alleges breach of his right to a hearing, of the procedure for dismissal in R II 5.02 and of the safeguards staff representatives enjoy under R VII 1.06. He repeats his claims, observing that reinstatement is warranted because his work was rated highly until his supervisor took a dislike to him and because his legitimate defence of staff interests should not harm his career.

E. In its surrejoinder the ESO takes up the issues of fact and of law raised in the rejoinder and develops the case in its reply. It submits that, since the transfer - which was warranted anyway for the reasons it explains further - is beyond challenge, the only material issue is whether the complainant's refusal of it empowered the Director-General under R II 1.24 to end his contract. In its submission the Director-General was so empowered, the action was not disciplinary and there was due process.

1. The complainant, who is of French nationality, joined the European Southern Observatory as an electronics technician on 1 October 1979. The duty station specified in his contract was La Silla, in Chile. Until 1987 his performance was satisfactory and he made good progress in his career. After unhappy differences of opinion with his supervisor, however, the Administration informed him by a letter dated 16 December 1987 that he would not be granted the annual salary step increase due at 1 January 1988, a decision that he contested.

2. By a letter dated 28 December 1987 the Head of Administration informed the complainant of the decision to transfer him to the Observatory's headquarters at Garching, in the Federal Republic of Germany and said:

"This decision is based on [Staff Regulation] R II 1.24 which empowers the Director-General to transfer a staff member - with the latter's agreement - to assume duties at another duty station provided he has the necessary qualifications and ability and that the grade is not lower than before.

The same regulation specifies that if the member of the personnel does not feel able to accept the proposed transfer and prefers a termination of contract, indemnities shall be paid as though ESO had terminated the contract."

3. The actual wording of R II 1.24 is as follows:

"A member of the personnel may, if so required by the Director-General, be assigned to a job other than that indicated in his contract, provided that he has the necessary qualifications and ability and that the grade attached thereto is not lower than his present one.

On the same conditions and with his agreement he may also be called upon to assume duties at another duty station. In this case, if the member of the personnel does not feel able to accept the proposed transfer and prefers a

termination of contract, then indemnities shall be paid as though ESO had terminated the contract.

A member of the personnel may also, with his agreement, be transferred to a job of a lower grade."

4. From the correspondence that ensued it emerges that the complainant took the view that the transfer was the Observatory's way of resolving the "conflictive" situation at La Silla and, as he did not feel responsible, he would not consent to the transfer. Nor did he prefer to have his contract terminated with the payment of indemnities. He said that he wanted to abide by the terms of his contract, which provided that his duty station was La Silla and which, according to Article R II 1.15 of the Staff Regulations, could not be changed without his consent. He knew that according to Article VI 1.01 of the Staff Rules an appeal would not defer the effect of a disputed decision. He would obey the decision by the Director-General to transfer him even though he disputed it. He said that there was no provision for dismissal on the grounds of refusal of transfer.

5. The complainant having failed to give the unqualified acceptance of transfer which was sought, the Director-General terminated his contract by a letter dated 19 April 1988. An internal appeal was unsuccessful and the Director-General confirmed his dismissal by a decision dated 7 September 1988, which is the one impugned.

6. The Observatory took a mistaken view of Article R II 1.24. The article provides, first, for assignment by the Director-General to a job other than the one stated in the contract, and for that the staff member's consent is not required; and, secondly, for transfer to another duty station, with the staff member's consent. If the staff member "does not feel able to accept the proposed transfer and prefers a termination of contract", indemnities are payable. For the second part of the rule to operate the staff member's consent is necessary: he must either consent to the transfer or else prefer termination of contract. If he neither consents to transfer nor prefers termination, the only possibility left is to leave him at his duty station.

Since the ESO has duty stations in only two countries, Chile and the Federal Republic of Germany, and since staff are recruited for one or the other, the mobility of staff is not essential to the Observatory's work. The requirement in the Staff Regulations that the staff member consent to transfer is in marked contrast to other international organisations, in which transfer is common and the executive head has discretion to transfer staff from one duty station to another whether they consent or not.

Although a staff member who refuses transfer always runs the risk of having his post abolished, that is not a risk which arose in this case since the complainant's post was a continuing one.

The complainant is correct in his submission that there is no provision in the ESO's rules for dismissal on the grounds of refusal of transfer.

7. In its reply the ESO argues that the responsibility of the Director-General was to find a solution to the situation at La Silla, which was harmful to the working climate. It submits:

"He came to the conclusion that it would be unwise and might even stir up further problems if he were to investigate the causes and responsibilities involved further and he decided, therefore, that the best way to solve this problem consisted in - regardless of where the responsibility for this situation might lie - transferring complainant to headquarters where he would - retaining, of course, his grade and step - perform similar duties corresponding to his experience and professional qualifications."

That may have been a pragmatic decision, but it was unjust to the complainant. What the Director-General did was to make a decision without determining the relevant facts.

8. The Director-General's decision should be set aside on the grounds (1) that he misinterpreted Article II 1.24 and (2) that he failed to determine all the relevant facts.

9. The complainant is also entitled to an award of moral damages for the injury he suffered. The amount must take into account, among other things, the fact that he was compelled to take home leave without his family within a time limit wrongfully set by the ESO.

10. The complainant asks that the decision of 28 December 1987 informing him of the transfer be set aside. Since that decision was conditional upon his consent, which he did not give, it was not a final decision and it is not appropriate to ask that it be set aside.

DECISION:

For the above reasons,

1. The Director-General's decision of 7 September 1988 is set aside.
2. The complainant shall be reinstated in the service of the European Southern Observatory with full arrears of salary and allowances but shall give credit for any payments he may have received from the ESO after the date of the purported termination and for any earnings from other sources.
3. The ESO shall pay him 8,000 Swiss francs in moral damages.
4. It shall pay him 4,000 Swiss francs in costs.

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

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner