

SIXTY-NINTH SESSION

In re BAUDET

Judgment 1037

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Loïc Baudet against the European Southern Observatory (ESO) on 7 July 1989 and corrected on 15 August, the ESO's reply of 9 October, the complainant's rejoinder of 22 November 1989 and the Observatory's surrejoinder of 8 January 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article VI 1.02 of the Combined Staff Rules of the ESO and Articles R II 1.19 and R II 6.03 of the ESO Staff Regulations;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article R II 1.19 of the ESO Staff Regulations reads:

"Members of the personnel shall receive on appointment a fixed-term contract of not more than three years' duration. This contract may be renewed or extended once or more often to cover a maximum total period of not more than nine years. After this period of nine years, the Director-General will grant an indefinite contract, or the contract will be terminated. ..."

The complainant, a Frenchman born in 1953, joined the staff of the ESO on 1 April 1981. His appointment was for three years, he was a technician in the optics group of the Technical Research Support Department (TRS) at the ESO's astronomic observatory at La Silla, in Chile, and he held grade 7. After three months' probation he had his appointment confirmed. The leader of the group resigned at the end of 1982 and was not replaced. The head of TRS reported favourably on 7 September 1983 on the complainant's performance, he was granted another three years' appointment from 15 March 1984 and an exceptional salary increase. The head of TRS again spoke well of him in a report dated 1 January 1986: though not the formal leader he had played the "leading role" in the optics group and was "dedicated and hard-working"; he got another exceptional salary increase.

Having been asked to say whether he should get an indefinite appointment, the head of TRS on 12 March 1986 recommended against it: though "reliable and hard-working", he might not be "suitable on a long-term basis", but he should be kept on "for the moment" because of his experience and the technical improvement he had shown in the last two years. His contract was extended by another three years to 15 March 1990.

In a minute of 29 December 1988 the head of TRS declined to recommend an indefinite appointment: the optics group was not yet giving the same quality of service as it had up to 1982 and he doubted whether the complainant would "acquire the deeper understanding" of optical instruments that the ESO would require of him. A body known as the Contract Advisory Committee said in a report of 25 January 1989 that the group needed a leader and that the complainant would not do; he might progress in his own field but not in others; two members thought that he might be given an indefinite appointment as a technician. On 26 January the Management Team at La Silla recommended against offering him an indefinite appointment.

By a letter of 5 April 1989, which the complainant got on 13 April and which contains the decision he impugns, headquarters informed him on the Director-General's behalf that he would not be offered an indefinite appointment. That meant that, according to Article R II 1.19, he would get no extension at all and, in accordance with Article R II 6.03, which requires at least six months' notice of non-renewal of contract, his appointment was to expire at 15 March 1990.

He wrote on 11 May 1989 to the Director-General objecting to the refusal of an indefinite appointment. In his reply of 14 June the Director-General told him that under Article

VI 1.02 of the Combined Staff Rules no appeal lay against non-renewal, but that the reason for the refusal was that he did not come up to the highest standards of qualification and performance.

B. The complainant submits that the non-renewal was a discretionary decision that shows several fatal flaws and should be set aside, the more so because of his many years of ESO service.

Holding as he did a post as a technician at grade 7, he had no managerial duties and should ordinarily have been answerable to an experienced engineer. Up to the end of 1982 he reported to the group leader, who held grade 9. The post of leader was advertised in January 1983 but was never filled, and he and the other technicians went on working on their own without formal supervision. Though it was he who took charge in practice, as the head of TRS acknowledged, and though his hard work and devotion kept the group going satisfactorily, he never got the title or grade of leader.

The decision not to renew his appointment was based on the allegedly poor performance of the optics group. Yet he cannot be blamed for that when the group had no official leader, and that amounted to a mistake of fact.

It was unfair to have him head the group for years and then get rid of him on the grounds that his leadership was not up to standard. He ought to have been judged as a technician, not as a group leader. Essential facts were therefore overlooked.

The decision is contrary to the Observatory's interests. The head of TRS had doubts in 1986 about the complainant's ability to head the group and should have acted then to have a leader appointed. The vacancy was not announced again until April 1989. Whoever may be appointed, it is bad management to deprive him of the help of an experienced technician like the complainant, who, after all, got good appraisals for his first six years' service.

He claims reinstatement; failing that, damages amounting to full pay and allowances for three years for loss of career prospects; damages for moral injury; and costs.

C. In its reply the Observatory submits that the complaint is devoid of merit. The complainant had no right to renewal or to an indefinite appointment, and no legitimate expectations of renewal either, because he had known of the reluctance to grant him another three years in 1986.

The decision he impugns was at the Director-General's discretion and shows no fatal flaw.

It was not contrary to the ESO's interests. As the Director-General said in his letter of 14 June 1989, there were serious doubts about his abilities as a technician and ESO policy is to refuse an indefinite appointment to anyone who falls short of the highest standards. Standards must be especially high when the staff member is a scientist, and in any case the Tribunal will not replace the Director-General's assessment of an official with its own.

There was no mistake of fact. The decision was taken because of the complainant's own limitations, not because of any decline in the performance of the optics group.

No essential facts were overlooked. The records show that all along there had been doubts about the complainant's abilities as a technician. He was granted the exceptional salary increases not because he was competent but because he was hard-working and devoted. Though the Contract Advisory Committee and the Management Team at La Silla did discuss his qualities of leadership they also thought him unfit for an indefinite appointment even as a technician. Besides, they were merely giving advice; that it may have been ambiguous does not flaw the Director-General's decision, which was based on the full records of the case, including the complainant's personal file.

The decision being lawful, his claims are unfounded.

D. In his rejoinder the complainant presses his claims. He again points out that, though appointed as a technician, he headed the group from 1983 on, that it was bad management not to fill the post of group leader and that the reason for the non-renewal was that he was thought not fit to be the leader. So said the head of TRS, the Committee and the Management Team, and the letter of 5 April 1989 based the decision on their recommendations. The Director-General's letter of 14 June 1989 also mistakenly affirmed that there had been nothing wrong about taking account of his leadership of the group.

E. In its surrejoinder the ESO points out that the complainant never acted as sole leader anyway; he shared the

leadership with another official and he was mainly in charge of administration. In any event that did not preclude assessing him as a technician and finding him below par as such. His allegation of bad management is unfounded; besides, even if true it would have no bearing on the lawfulness of the impugned decision.

CONSIDERATIONS:

1. The complainant applied to the ESO for a post for an optical technician at grade 6/7 in the optics group of its station at La Silla in Chile. His application was successful, and he was granted an appointment from 1 April 1981 to 31 March 1984. As advertised his post comprised the following duties:

"test and check-up of optical elements and sub-assemblies before integrating into an instrument,

participation in the assembly, adjustment and test of the new laboratory instruments necessary for the tasks described above,

successful carrying out of tests or experiments in a laboratory under supervision of a professional engineer or a scientist."

2. The leader of the optics group left and his post was advertised in January 1983. The duties stated in the vacancy notice were to supervise the work of a small group of technicians responsible for the preparation of "observing runs" on telescopes and to develop, organise and supervise the preventive maintenance of telescopes and auxiliary equipment (photometers, spectrographs, etc.). The preparation included the changeover of auxiliary equipment, the alignment of telescopes, focus tests and the aluminisation of mirrors.

No-one was appointed to the post or formally named leader of the optics group and so the work and responsibilities were shared among the members of the group. The complainant and another member of the group were given the task of coordinating the group's activities and the complainant was assigned additional duties within the group.

3. In September 1983 the head of the Technical Research Support Department (TRS), to which the group belonged, recommended granting the complainant another three years' appointment, observing that he had "assumed a large fraction" of the former group leader's responsibilities. He was accordingly granted another three-year contract, at grade 7, step 4. He was also awarded an exceptional step increase.

4. On 1 January 1985 the head of TRS recommended giving him another additional step increase, describing him as an "active and dedicated element within the Optical Lab" and saying that he had a "supervision function" as "shift leader". The additional step increase was refused because he had had one the previous year.

5. On 1 January 1986 the head of TRS again asked for an additional step increase on the grounds that the complainant had taken the "leading role" in the group and was hard-working and devoted. He was granted it as from 1 January 1986.

6. In the same month the head of the Personnel Service asked the head of TRS to review the case of the complainant, who by April 1986 would have spent five years with the ESO, to see whether he should be given an "indefinite term contract".

7. In a confidential minute dated 12 March 1986 the head of TRS recommended granting him three years' extension rather than such a contract. He said:

"Since the departure of [the former leader] three years ago the Optics Group has never recovered the excellency of service it used to offer at the observatory. We still have to look into different structural and personnel alternatives in order to improve its performance level.

It is not yet clear if Mr. Baudet will be suitable on a long term basis. He is however the more reliable and hard-working member of the optical team. We should certainly keep him with the organization for the moment in view of the practical experience he has acquired and also in view of his noticeable technical improvements over the past two years.

I propose therefore to offer him another three year contract and review his contractual situation at the end of it."

A handwritten note signed on the same day by the members of the Contract Advisory Committee reads:

"After additional explanations from [the head of TRS] on the organisational aspects of the optical group and the qualification of B [the complainant], the Committee supports the proposal [of the head of TRS]. In particular, because B has not yet demonstrated the level of performance (leadership) desired within the group."

8. According to Article R II 1.19 of the ESO Staff Regulations, after a total period of service of nine years the staff member shall either be granted an indefinite contract or have his appointment terminated. In a confidential minute of 29 December 1988, fifteen months before the complainant's three-year extension of contract was to expire, the head of TRS recommended against giving him any further extension. The reasons stated for that recommendation were:

"Mr. L. Baudet has demonstrated a hard working spirit and acquired practical experience with our optical instrumentation. Following the departure of two senior technicians he took over the operational responsibility for the optical team. During his leadership the group has never recovered the excellency of service it used to offer to the observatory. Complaints have been registered concerning the care of our optical components.

The optical section at La Silla is far from being optimised from the qualification point of view. It is doubtful whether Mr. L. Baudet will acquire the deeper understanding of our instrumentation which will be required in the future.

Therefore I do not feel able to recommend him for an indefinite appointment with our organization."

9. The Contract Advisory Committee met to consider whether the complainant should be offered an indefinite contract. Its report of 25 January 1989 said that it had

"... agreed on the following conclusions:

(a) There is a long term requirement for the position of group leader in the optical section in Chile but LB [the complainant] is not considered to be able to fulfil this position. LB was engaged as a technician and it is the view point of two members of [the Committee] that LB was capable of functioning correctly at technician level and probably still is. The department head still doubts that this is the case.

(b) LB has not fully met the requirements of the position of group leader. [The Committee] feels that LB might be able to further advance in his specialization but not in other related fields.

(c) In his present position an indefinite appointment is not in any case justified. Two members of [the Committee] think that the granting of an indefinite contract to LB might be only justified with LB at a technician level and under the supervision of a good head of group."

10. The Management Team at La Silla (MT/LaS) also considered the matter. Their report of 26 January 1989 read:

"MT/LaS supports the recommendation of the head of TRS. L. Baudet has not been able to develop the required leadership to raise the standard of the optical group to the level required at La Silla. Both on the basis of the recommendation of his direct supervisor and on the basis of the direct interaction of two members of the MT/LaS [names] with the candidate, MT/LaS does not consider that L. Baudet may evolve in the future to develop the technical skills and leadership abilities required for this job.

For this reason MT/LaS does not propose to grant L. Baudet an indefinite appointment."

11. By a letter of 5 April 1989 the complainant was informed on the Director-General's behalf that on the recommendation of his supervisor, confirmed by the Contract Advisory Committee and the Management Team, it had been decided not to offer him an indefinite contract; he would therefore leave on 15 March 1990.

12. The complainant appealed to the Director-General by a letter of 11 May 1989 pointing out that he had been employed as an optical technician and that the papers signed by the head of TRS, the Contract Advisory Committee and the Management Team showed that "their deliberations were concerned with the position of section leader optics, a position never assigned" to him.

13. The Director-General reviewed the decision of 5 April 1989 but came to the same conclusion and by a letter of 14 June 1989 so informed the complainant.

14. It is the decision of 14 June 1989 rather than the one of 5 April that is impugned. Whether or not to renew a fixed-term contract is a matter of discretion. But the discretion is not unfettered, and the Tribunal will set the decision aside if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

15. The issue on which the complaint turns is whether the Director-General, following the Contract Appeals Committee and the Management Team, was correct in taking into account the complainant's lack of qualities of leadership as well as the level of his technical skills.

It is clear that in the minds of the members of both Committee and Team the two were closely enmeshed. The Committee saw the job as including group leadership, of which it believed that the complainant would not meet the requirements. The Team also considered that he would not develop the technical skills and "leadership abilities" required for the job.

The Director-General endorsed the views of the Committee and the Team and in his letter of 14 June 1989 said that they had been correct in taking his leadership into account.

The job as advertised in 1981 and as it was to begin with did not require qualities of leadership since the complainant was working under the then group leader. The ESO having failed to appoint anyone to replace that group leader on his departure, the complainant took on additional responsibilities and duties, including those that did call for leadership. The Observatory is of course entitled to look at the full picture of his work performance; what it is not entitled to do is to reach a conclusion on the grant of an appointment to him on the strength of his performance in an area which was not covered by his job. He willingly undertook the additional responsibilities and was indeed commended for doing so. Whatever shortcomings he may have shown in performing them should not have counted against him. At all levels the ESO authorities involved in the decision mistakenly took into account facts that were unrelated to his ability to perform his actual job and it was clearly an important factor in the decision. That constituted a flaw that warrants the Tribunal's setting the decision of 14 June 1989 aside in exercise of its power of review as defined in 14 above.

16. In the circumstances it is appropriate, not to reinstate the complainant, but to pay him twelve months' salary and allowances in damages for both the material and the moral injury he has sustained.

DECISION:

For the above reasons,

1. The decision of 5 April 1989 confirmed by the decision of 14 June 1989 is set aside.
2. The Observatory shall pay the complainant twelve months' salary and allowances in damages.
3. 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 26 June 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

