

SEVENTY-SIXTH SESSION

In re CARDENAS AGUILA

Judgment 1302

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Luis Cárdenas Aguila against the European Southern Observatory (ESO) on 29 January 1993, the ESO's reply of 12 May, the complainant's rejoinder of 6 June and the Observatory's surrejoinder of 23 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles LS II 1.09, LS II 1.13 and LS II 5.04 of the Regulations for ESO Local Staff in Chile as in force before 1984 and Article LS II 1.07 of the same Regulations as now in force;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Chilean born in 1938, was employed by the ESO first in 1976, then under a short-term contract from 30 December 1977 to 28 February 1978 as a guard at grade A2. After his contract expired he worked from time to time in the first-aid unit at the Observatory's station at La Silla, in the Chilean Andes, as locum tenens for medical assistants at the weekend or when they were on leave.

On 1 December 1980 a private Chilean company at La Serena, known as Servicios generales y administrativos (SEGA), contracted with the ESO to provide the services of two nurses and from 1 December 1980 to October 1992 employed the complainant to perform nursing duties in the first-aid unit. According to a schedule to his service agreement with the company his working conditions were to be subject to the authority of the ESO's Department of Personnel and SEGA would employ him for as long as the ESO needed his services.

The ESO withdrew from its contract with SEGA as from October 1992 and concluded one instead with a Chilean institute for occupational safety. By a letter of 24 September 1992 SEGA informed the complainant that it was terminating his service agreement with it on the grounds that the services which it had appointed him to provide were no longer required. By another letter, of 19 October, it informed him that the ESO would grant him an indemnity *ex gratia* in the amount of twelve months' basic salary, which SEGA would make over to him in the terminal settlement.

On 25 October 1992 the complainant appealed against termination to the ESO's Director in Chile and claimed the benefits due under the Regulations for Local Staff. In a letter of 23 November the ESO's representative in Chile replied that, not having been a member of the ESO's staff since February 1978, he was not subject to those Regulations and, since the Observatory's appeal procedure was therefore not open to him, he should put any claims he might have to SEGA. By a letter of 4 December 1992 he submitted an internal appeal to the Director General. In a letter of 7 January 1993 to his counsel - the decision under challenge - the Head of Administration confirmed that his appeal was irreceivable for the reasons already given.

B. The complainant submits that his dismissal was wrongful and based on mistaken conclusions of fact. Article LS II 5.04 1) of the Regulations for Local Staff, on which he says the ESO based his dismissal, provides that such staff may be dismissed upon "termination of the work or service for which the contract was made". But the ESO merely turned over to others the work he had been doing for many years and had its agent, SEGA, pay him off with another twelve months' salary.

He seeks the quashing of the decision of 7 January 1993 and reinstatement with full rights from the date of termination or, failing that, an award of three years' gross pay for loss of career prospects and moral injury. He claims payment by the ESO of social security contributions for the period from October 1976 to October 1979, of all benefits and allowances he should have been granted since joining the ESO, and costs.

C. In its reply the ESO submits that the complaint is irreceivable under Article II(5) of the Tribunal's Statute, which

confines competence to cases of alleged "non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations". He may not now allege breach of any term of his appointment because his last contract with the ESO was the one that expired on 28 February 1978. Nor indeed were the Observatory's Regulations applicable to him.

Under Article LS II 1.09 of the Local Staff Regulations the signing of a contract is an essential condition of recruitment. The complainant was under contract with a private company at the material time and therefore subject to Chilean labour law. As is plain from the case law the fact that an international organisation set the complainant's working conditions did not make him subject to its regulations. Nor did the ESO's inviting SEGA to pay him a special indemnity at the Observatory's own expense make him a staff member.

D. In his rejoinder the complainant maintains that for years his real employer was the ESO: it had the benefit of his services, set the length of his contract, supervised him and took charge of his training, salary and allowances and the cost of supplies. The contract he signed with it in 1977 was tacitly converted into one of indefinite duration in keeping with Articles LS II 1.13 and LS II 5.04 12) of the Local Staff Regulations. At the material time those Regulations provided for the offer of such a contract after probation, the understanding being that if an employee continued working after his original contract expired it became permanent. That his original contract was for his services as a guard, not as a nurse, was just a provisional arrangement which the ESO made because it already had two permanent staff nurses.

E. In its surrejoinder the ESO disputes the complainant's assumption that his contract became a permanent one. Article LS II 5.04 12) as in force at the material time applied only to a local staff member whom the ESO kept on after expiry of a fixed-term contract that ran for six months. The complainant's only ESO contract was for two months, and his later occasional employment affords no grounds for inferring continuance of his contract with the Observatory. He went on to spend a dozen years under contract with a private firm. Besides, even if he was a staff member his claims are by now time-barred.

CONSIDERATIONS:

1. At its astronomical observatory in the north of Chile, at La Silla, the ESO maintains a first-aid unit for staff. Up to June 1979 it employed in the unit on weekdays at least one permanent medical assistant as a member of its Local Staff and at weekends and to replace the assistants during holidays temporary part-time "paramedics".
2. In a personal history form which he submitted to the Observatory on 21 June 1979 the complainant stated that since 1976 he had "rendered sporadically services" at the first-aid unit. He says that at first the ESO took him on in October 1976 after he had answered an advertisement it had put in a newspaper at La Serena calling for the services of paramedics at weekends; then, from 30 December 1977 to 28 February 1978, he served as a local staff member under a two-month contract. Although he continued to work in the unit thereafter, it is not quite clear whether he was a part-time or full-time employee. At all events the Observatory states that when its then medical assistant retired in June 1979 it appointed no successor but decided to take on independent paramedics for work on weekdays. It is therefore probable that the complainant worked full time as such from June 1979.
3. On 1 December 1980 the ESO concluded a contract with a Chilean firm known as Servicios generales y administrativos, or SEGA, whereby it undertook in consideration of a monthly fee to provide the Observatory with specified services, including those of two paramedics. Also on 1 December 1980 the complainant concluded a service agreement with SEGA as employer whereby he was to work as a paramedic in the first-aid unit at La Silla in return for a monthly salary to be paid by SEGA. The agreement expressly stated that it would last until the ESO ceased to require the services provided for in its contract with SEGA.
4. The contract between the ESO and SEGA came to an end in 1992 when the Observatory concluded a similar one with a Chilean institute for occupational safety which it believed better able to provide the medical and paramedical services it required. SEGA thereupon terminated its service agreement with the complainant.
5. On 25 October 1992 the complainant submitted an internal appeal to the ESO alleging that he was a member of its local staff and that it had wrongfully dismissed him. But by a letter of 7 January 1993 the Head of Administration informed him that since he had not been a local staff member his appeal was irreceivable. That is the decision he is impugning.

6. He maintains that under the two-month contract he held with the ESO from 30 December 1977 to 28 February 1978 he had the status of a local staff member on a fixed-term appointment and that his continuing to work for the Observatory thereafter made his appointment a permanent one in accordance with Article LS II 5.04 12) of the Regulations for Local Staff as in force at that time. But his plea fails. For one thing, his contract was not a fixed-term but only a "temporary" one; for another the sporadic services he may have rendered thereafter were not such as to entitle him to contend that he continued to work for the ESO. The rule therefore did not apply.

7. He further submits that the ESO was required under Article LS II 1.13 as then in force to grant him a permanent appointment. But the argument again is unsound. That rule was applicable only upon satisfactory completion of probation under a contract for a period of not less than six months, whereas the complainant's contract was for a lesser period. Besides, the ESO did not in fact offer him a permanent appointment at the time and it is too late for him now to object to its failure to do so. The conclusion is that he was not a local staff member on 1 December 1980.

8. Article LS II 1.07 of the ESO's Regulations for Local Staff stipulates that there shall be a written contract of employment signed by the local staff member and by someone designated by the Director General on behalf of the Observatory. The complainant holds no contract purporting to have been entered into by or on behalf of the Observatory. Although he contends that SEGA was the entity designated by the Director General to sign on the ESO's behalf the service agreement with him dated December 1980, he offers no evidence whatever to bear out that contention.

9. In support of his view that his employer was not SEGA but the Observatory he puts forward two pleas.

(a) The first is that in its pleadings on the complaints that the Tribunal ruled on in Judgments 507 (in re Azola Blanco and Véliz García) and 508 (in re Acosta Andres) the ESO argued that the services provided by SEGA covered "only short-term manual labour for which it would be uneconomical to employ permanent staff and which [was] therefore contracted out"; and he points out that the work he performed under contract for 12 years was not "manual" but technical and was by no means "short-term".

(b) His second plea is that he was working throughout on ESO premises, and that the Observatory determined his functions, exercised control and supervision over his work and gave him board and lodging and transport.

Such allegations do not, however, suffice to establish that it was the ESO that in 1980 appointed him as a member of its local staff. The fact of the matter is that it was SEGA that employed him on its own behalf, not as an agent of the ESO. Since he is wrong in contending that the ESO was his employer the Tribunal is not competent to entertain his complaint, and it must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

William Douglas
E. Razafindralambo
Mark Fernando
A.B. Gardner