

EIGHTY-SIXTH SESSION

In re Adorf (No.2)

Judgment 1789

The Administrative Tribunal,

Considering the second complaint filed by Mr. Hans-Martin Adorf against the European Southern Observatory (ESO) on 29 August 1997 and corrected on 8 December, the ESO's reply of 6 March 1998, the complainant's rejoinder of 18 June and the Observatory's surrejoinder of 27 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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 ESO employed the complainant as a scientific systems analyst and programmer from 1 February 1985 to 30 April 1997. On 30 October 1996 it told him of its decision not to renew his appointment after 30 April 1997 on the grounds, among others, that he had "outgrown" his post. Judgment 1738 of 9 July 1998 dismissed as irreceivable his first complaint against a decision that no appeal lay against the non-renewal.

On 23 December 1996 the Observatory published a notice announcing an external competition for his post, No. EHT702. By a letter of 30 January 1997 to Personnel Services he applied. By a letter of 11 March a personnel officer answered that, his supervisors having declared him overqualified, the ESO had put the post up for competition; so it would "not be able to consider" his application and was sending it back.

On 7 May 1997 he appealed against that decision and asked the Director General, if his case failed, to let him go straight to the Tribunal. By a letter of 2 June the head of Administration answered that the Observatory was confirming the decision of 11 March but waiving the internal appeal procedure. That is the impugned decision.

B. The complainant pleads breach of his right to have his application objectively assessed. Article R II 1.03 of the Staff Regulations says that candidates for a vacant post shall be examined by a Selection Board, and Article R II 1.22 that

"a member of the personnel may apply for any vacant post not filled by reassignment."

The case law has it that anyone who answers the terms of a notice is entitled to have his application considered and assessed as laid down in the Staff Rules and Regulations.

The impugned decision shows abuse of authority. The reason why the ESO would not let the complainant apply was that for ulterior motives it was bent on getting rid of him. By denying him due process of selection it showed him animosity, the more so since appointing him would have served its own interests.

Its refusal to entertain his application harmed his standing by showing its resolve to do without him. It has caused him unnecessary and undue injury.

He seeks the quashing of the decision of 2 June 1997 and an award of costs.

C. In its reply the Observatory explains that according to Article R II 1.03 of the Staff Regulations selection is in stages. Some are picked at the outset on the strength of their applications; then the Selection Board rates them; and the Director General makes the appointment on its recommendations. That procedure was duly applied in this case. It helps in discarding applicants who obviously do not qualify and do not need to go even to the Board. So the complainant is wrong to read the letter of 11 March 1997 as forbidding him to apply: all it did was tell him of the

outcome of the first stage of the process, at which he had been dropped.

The Observatory believes that it was right to reject him. The purpose of Article R II 1.22 of the Staff Regulations is not to privilege a serving staff member in a competition open to outside candidates. It rebuts his other pleas.

D. In his rejoinder the complainant points out that the Observatory rejected him as overqualified for his own post. So it may not properly assert the right to do so on the grounds that he was unfit for it. He was entitled to an indefinite appointment, and the defendant was in fact trying to get rid of him so as to recruit someone new more cheaply on a fixed-term appointment.

E. The Observatory maintains in its surrejoinder that he is not qualified for post EHT702. Since he was overqualified it saw no point in putting his application to the Board. Replacing him with someone cheaper was not at all its purpose.

CONSIDERATIONS

1. The salient facts of the case appeared in Judgment 1738, which ruled on Mr. Adorf's first complaint. The European Southern Observatory used to employ him as a scientific systems analyst and programmer in a division of the Observatory known as Space Telescope - European Coordinating Facility. It told him by a letter of 30 October 1996 that it would not be renewing his contract beyond 30 April 1997, the date of expiry.
2. On 23 December 1996 it announced that his post was vacant, and he applied for it on 30 January 1997. By a letter of 11 March a personnel officer informed him that for the same reason that had led the Observatory not to renew his appointment it was rejecting his application: he was "overqualified" for the job.
3. On 7 May 1997 he put a request for review to the Director General. By a letter of 2 June 1997 the head of Administration answered on the Director General's behalf upholding the decision of 11 March but giving him leave to go straight to the Tribunal without making any internal appeal.
4. On 29 August 1997 he filed this complaint seeking the quashing of the decision of 2 June. He contends that it is unlawful because it shows (1) a mistake of law, (2) abuse of authority and personal prejudice, and (3) breach of the ESO's duty to respect his dignity and reputation. The decision caused him - he says - undue and unnecessary suffering and so serious material and moral injury.
5. The complainant imputes a mistake of law to the Observatory: it forbade him to apply for a vacancy for which no-one can be better qualified or have greater experience, and so its breach of due process and equal treatment was flagrant.
6. The defendant's answer is that Article R II 1.03 of the Staff Regulations empowers it to make a first pick of the applications to go to the Selection Board and at that point strike out anyone who obviously fails to qualify. That is just what it did here and there is therefore no procedural flaw.
7. R II 1.03 reads:

"The candidates for a vacant post, selected on the basis of their applications, shall be examined by a Selection Board, composed of representatives of the divisions concerned and of a representative of the Administration."

In his rejoinder the complainant explains that he is not pleading abuse of process or some trivial mistake of procedure but misapplication by the ESO of its own rules on competitions. Judgment 729 (*in re Ilomechina*) said:

"the principle of equality, which is binding on an international organisation even if it is not stated in the rules, requires that when a vacancy occurred all members of the staff should have the same opportunity of securing it."

The Tribunal confirmed that precept in Judgment 1272 (*in re Diotallevi and Tedjini*), in which it held that anyone who wants a vacant post that the rules say has to be put up for competition must be allowed to do so and considered by objective criteria.
8. It appears on the evidence that the post advertised and put up for competition was indeed the complainant's old one. Although the ESO acknowledged in his appraisal report that he had performed well in that post it rejected him

on the grounds that he was overqualified. Such grounds are wrong in law. Yet they are the only ones on which the Observatory rejected the complainant, purporting to act under R II 1.03, which it says gave it discretion to reject anyone without review of the lawfulness of the reasons for doing so. It thereby denied the complainant his right to apply and to have his application properly considered. There was breach of equal treatment.

9. The Director General's decision of 2 June 1997 cannot stand. The Observatory shall pay the complainant 3,000 German marks in material and moral damages and 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 2 June 1997 is set aside.
2. The Observatory shall pay the complainant 3,000 German marks in material and moral damages.
3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner