

EIGHTY-SEVENTH SESSION

In re González Lira

Judgment 1854

The Administrative Tribunal,

Considering the complaint filed by Mr Germán González Lira against the European Southern Observatory (ESO) on 3 July 1998, the ESO's reply of 23 October, the complainant's rejoinder of 20 November 1998 and the Organization's surrejoinder of 21 January 1999;

Considering Articles II, paragraph 5, and VIII 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 complainant, a Chilean who was born in 1947, joined the ESO in 1969, under an indefinite contract as an administrative assistant at its La Silla observatory in the Chilean Andes. At the material time he held grade B2.

By a letter dated 28 August 1991 the ESO told him his post there would be abolished at the end of 1992. It offered him the post of general administrative assistant in Antofagasta, in the Paranal region where the Very Large Telescope (VLT) was under construction. The letter said that the incumbent of the post would report "functionally to the Chile Administration and operationally to the VLT [Site and Building] group" but that "after the period of construction of the VLT, this post would reintegrate the Chile-Administration department". The complainant was assigned to the post.

At the end of 1995, however, during the final phase of construction it became necessary to locate at the Paranal site some of the coordinating activities carried out previously by the Antofagasta office. The complainant was assigned to a new position of general administrative assistant at Paranal, reporting to the Administrator in Chile, with certain benefits including, on an exceptional basis, a rent allowance for housing in Antofagasta. In 1996 he had responsibility for General Services and Logistics of the Paranal observatory. Further reorganisation took place on that site in 1997 and ESO needed to convert the complainant's post into one for an administrator with overall responsibility for VLT administration.

The Administrator in Chile told the complainant by a letter of 18 June 1997 that his post would be abolished and his contract terminated as from 31 July 1997 under Articles LS II 5.03 and LS II 5.04(10) of the Regulations for ESO Local Staff in Chile, viz. for "reasons determined by the functional necessities of the Organisation". He told him that despite ESO's attempts to find him another post none had been found.

The complainant appealed to the General Manager in Chile against the abolition of his post and claimed certain "statutory rights". The General Manager confirmed his decision on 28 July 1997. The complainant subsequently appealed to the Director General at headquarters, in Garching near Munich in Germany, who referred the matter to the Local Staff's Joint Advisory Appeals Board, in La Silla, which reported on 12 March 1998. Reinstatement, in its opinion, was not feasible, but it recommended a recalculation of the complainant's indemnities to consider an *ex gratia* bonus he had requested to cover reimbursement of unpaid rent allowance. In any case it offered to mediate with a view to a new negotiation between the parties. By a letter of 28 April 1998 - which the complainant impugns - the head of Administration told the complainant that the Director General was upholding the decision to terminate his contract and asked for his "views on any new elements of discussion which could lead to a final settlement" of his case.

B. The complainant pleads that his dismissal was unlawful. In terminating his contract ESO did not abide by the rules on reassignment. He had an indefinite contract and ESO should have taken steps to find him other duties. Article R II 6.10 of the international 1983 Staff Regulations says as much and Article LS II 1.15 applicable to local staff and headed "Transfer due to the requirements of the service" provides, he submits, for such reassignment. If ESO did make attempts to find him a post they were carried out in secrecy. Moreover he pleads that ESO went back on its promise of 1991 that "after the period of construction of the VLT" his post would "reintegrate the Chile-

Administration department".

The decision to dismiss him was arbitrary. His position still existed: another staff member was on the post. Besides the duties of the job description for his post and the duties for the "Paranal Administrator" ESO advertised for in order to replace him were practically the same. Besides his type of "technical job" will still be needed at the Paranal observatory. ESO replaced him with a newcomer on a mere fixed-term contract without a rent allowance: there was no reason to dismiss him.

He seeks the quashing of the Director-General's decision of 28 April 1998, reinstatement, payment of salary from 1 August 1997 up to the date of his reinstatement and costs. Failing reinstatement he claims an award of damages "equivalent to five times [his] total gross remuneration for the period from 31 July 1996 up to 31 July 1997", plus interest at 12 per cent a year, from the date of filing this complaint. Likewise he claims the indemnity of 44,421,762 Chilean pesos offered by ESO in a letter dated 3 July 1997 with a cost-of-living adjustment from 1 August 1997.

C. In its reply the Observatory submits that an organisation "may revise and restructure its operations" and "take the necessary decisions affecting its staff" even if it means terminating appointments of staff on indefinite contracts. For the operative phase of the Paranal observatory the ESO needed to put in place an administrator performing some of the complainant's duties but with considerably increased responsibilities. The complainant lacked the training and leadership experience required to take "overall responsibility for the VLT administration". ESO rejects the allegation that it wanted to recruit someone on a fixed-term contract and without a rent allowance.

It did make efforts to find him alternative employment, but none was found. The Appeals Board thought reinstatement would only be possible in a post "hierarchically" independent of the ESO Administrator in Chile, the complainant's supervisor, as their working relationship had soured. Posts in the Chile Administration were thereby excluded. No other post was available except one which would be filled in late 1999.

In line with the recommendation of the Appeals Board ESO sought agreement with the complainant on the financial terms of his separation and negotiated a 50 per cent increase of his statutory indemnities and end-of-contract benefits. The complainant demanded other benefits equal to an increase of nearly 100 per cent. It asserts that the complainant has received the termination indemnities he is entitled to and refused the offer "for an amicable settlement".

D. In his rejoinder the complainant argues that the ESO's promise still stood. The offer of a post of general administrative assistant in 1995 at Paranal ratified the decision of 1991 to assign him to the post at Antofagasta. So when he took the post in 1995 he still trusted in ESO's former promise that his post "would reintegrate the Chile-Administration department".

He reiterates that his post was not abolished: it was a "continuing one". The Appeals Board too doubted whether any "real suppression of post was made".

While it is true that the Board did not recommend reinstatement because of the deteriorating relationship with his supervisor it did recommend, he says, an award of damages and a "new negotiation in order to achieve an harmonic agreement".

At the complainant's request, in a draft document dated 25 June 1997 ESO had offered to round the amount up to 51,783,000 pesos. He was advised that the monthly rental allowance was to be calculated in his termination indemnities as it was part of his "permanent package of remuneration". The only way the personnel officer in Chile had allowed for the rental allowance in that sum was as an "additional ex gratia payment" amounting to 10,553,000 pesos. The fact that the ESO Administration at headquarters did not approve the amount agreed in Chile gave rise to his internal appeal.

E. In its surrejoinder ESO rebuts the complainant's arguments and enlarges on its pleas. The offer of the post of general administrative assistant in Paranal in 1995 carried no such promise of reintegration into the Administration in Chile.

It is misleading to say the complainant's post continued. The post of Paranal administrator required higher professional qualifications than the complainant had and involved larger responsibilities.

ESO rejects the suggestion that it wanted to "get rid of" the complainant because he enjoyed a rent allowance. He adduces no evidence in support of his allegation. Moreover he had appealed against a decision of the General Manager in Chile relating to the allowance in early 1997 and the matter appeared "closed and settled".

There was no "agreement on an amicable settlement" during negotiations preceding the filing of the present complaint. ESO's personnel officer in Chile had no power to "accept" a proposal. After discussions with the complainant, proposals were referred to ESO headquarters for a decision by the Director General.

CONSIDERATIONS

1. The complainant joined the European Southern Observatory (ESO) on 1 May 1969, as a local staff member. He was granted an indefinite contract as an administrative assistant at the ESO's observatory at La Silla, in the Chilean Andes, about 700 kms north of Santiago.

2. Some years ago, the ESO commenced a project to establish a Very Large Telescope (VLT) at the Paranal observatory, which is on a mountain at a distance of 130 km from the town of Antofagasta, about 1,200 kms north of Santiago.

3. In 1991, the ESO Council decided to restructure its activities at La Silla in view of the development of the Paranal VLT, which was still under construction. That entailed a substantial reduction in activities at La Silla, making the post held by the complainant redundant. A letter dated 28 August 1991 offered him the post of "general administrative assistant" at Antofagasta where he was expected to reside; it also stated that after the construction of the VLT "this post would reintegrate the Chile-Administration department". He accepted that post.

4. During the final phase of the construction of the VLT the Administrator in Chile informed the complainant by a letter dated 20 December 1995 that the ESO considered it necessary to relocate a number of administrative activities from Antofagasta to Paranal, "which [was] expected to increase the interaction and support given to the construction activities, and in the near future operations, in Paranal"; and that accordingly the ESO had decided to create a post of "general administrative assistant" at Paranal. The Administrator also undertook "to initiate a review of the post's grade in time for possible consideration by the Director General in the 1996 Advancement Review process". The complainant accepted that post.

5. It had been agreed that when the complainant took up residence in Antofagasta the ESO would reimburse the rent of his house. Accordingly, when the complainant first moved to Antofagasta, he was reimbursed the full amount of the rent he paid. Later he moved to another house, paying an increased rent. The Administrator refused to reimburse anything more than the previous rent, updated according to the consumer price index. On appeal, the General Manager ruled, on 24 March 1997, that the complainant should have been aware that he could not increase his house rental without previous authorisation; that his conduct seriously eroded ESO's trust in his capacity to handle financial matters; but that, exceptionally, his claim for increased reimbursement would be allowed because his employment conditions did not expressly specify a ceiling; and that any future modification would require the authorisation of the Administrator.

6. During that period, since the construction phase of the Paranal VLT was coming to an end and the VLT was expected to begin to operate in early 1998, the ESO was considering the reorganisation of the administrative structure required for the operative phase of the VLT. By letter dated 18 June 1997 the Administrator informed the complainant that in order to ensure "a close and efficient collaboration of the Administrative Unit with the activities of the Engineering, Technical and Scientific Teams" it had been considered necessary to replace his post with "a new post with functions and responsibilities substantially higher and different service requirements"; that his post would therefore be suppressed from 31 July 1997; and that after careful study it had been found that there was no other post within the ESO which would be suitable for him given his experience and qualifications. A few days later, the ESO issued a vacancy notice in respect of the new post of "Paranal Administrator".

7. On 5 August 1997, the complainant lodged an internal appeal in respect of the suppression of his post and the termination of his contract. Having interviewed the Administrator and others, the Local Staff's Joint Advisory Appeals Board concluded on 12 March 1998:

(a) that in terms of a modification to the complainant's contract, agreed upon when he was transferred to Antofagasta, he had the option to claim reimbursement of rent in lieu of the zone allowance of 15 per cent of the

basic salary plus four *aguinaldos*; that neither an amount nor a ceiling had been stipulated; and that the increased rent he had paid was reasonable;

(b) that the ESO Administration (and the Administrator in particular) considered that expecting the ESO to pay for the increased rent was an arbitrary act and a breach of faith or abuse of authority by the complainant; and that this incident had damaged the working relationship between the Administrator and the complainant;

(c) that although it was "considerably questioned" before that incident whether the complainant was suitable for the new post, afterwards he was definitely excluded from consideration;

(d) that it was not clear that there was "a real suppression of post ... since in practice [the complainant's] functions [continued] in a new post with broader authority"; and that the termination of his contract was caused mainly by a loss of confidence in him by his supervisor, the Administrator; and

(e) that the possibility of reassigning the complainant had not been really analysed, although he held a permanent contract and had no bad performance appraisals.

8. However, the Appeals Board did not recommend the reinstatement of the complainant because his working relationship with the Administrator was seriously damaged, unless reinstatement was possible in a post not hierarchically dependent on the Administrator. On 28 April 1998, the Director General decided to maintain the decision appealed against.

9. The complainant contends that the functions which he had been performing continued to be required even after the new Paranal observatory became operational, and that in fact the duties of the new post of "Paranal Administrator" were substantially the same as those of his former post. The termination of his contract was thus arbitrary. He further asserts that there is no evidence that the question of his transfer to another post was ever considered. He asks the Tribunal to quash the Director General's decision, communicated on 28 April 1998, and to order his reinstatement; and, if that is not possible or advisable, to award him compensation in a sum equivalent to five times the gross remuneration paid for the period from 31 July 1996 to 31 July 1997, with interest at 12 per cent per annum from the date of his complaint, together with the termination indemnity offered by the ESO in a letter dated 3 July 1997.

10. It is not disputed that an international organisation has the right to restructure its operations, suppressing posts if necessary and consequently terminating the appointments of staff members, even if they had contracts of indefinite duration. However in such cases the organisation is obliged to do its utmost, and in good time, to try to find alternative employment for them.

11. The ESO submits that the operative phase of the new Paranal observatory required an Administrator who would be responsible for administration and logistics "with new and substantially larger responsibilities which exceeded [the] complainant's qualifications and experience"; that although the Paranal Administrator's duties included some of the complainant's functions, he had also "to take overall responsibility for the VLT administration and to autonomously identify, analyse and solve the service needs of the observatory", "responding autonomously to the needs of the service at all levels in Paranal and Europe"; and that this was the reason why the post required a university degree or equivalent, preferably in business management, which the complainant did not have.

12. The vacancy notice for the new post stipulated that the Paranal Administrator "will report to the Administrator-ESO Chile and will work in close liaison with the Paranal Director". Three tasks were specified: taking "responsibility for the Logistics and Administrative Support functions at the Paranal Observatory"; the planning, coordination, execution and control of purchase and procurement cycles, commuting and communication services, vehicle maintenance, safety and security, and general administration services; and the supervision of subcontracted services.

13. The job description of the complainant's post stated that he would report to the Administrator in Chile; that its purpose was "to ensure that Paranal Construction and Operations receive the agreed upon level of administrative and logistical support"; and that because ESO outsources logistical support, his primary responsibility would be to "supervise, coordinate and control" the providing of services by contractors. There followed a detailed description of his "main responsibilities", consisting of administration, board and lodging, commuting (including the maintenance of vehicles), provisioning, and safety and security.

14. Not only are the functions listed virtually identical, but the vacancy notice made no express mention of any need for the Paranal Administrator to have to function "autonomously" in any particular respect.

15. It is true that the complainant did not have a university degree, which was one of the requirements for the new post. However, that requirement in itself did not make the functions of the new post different from the old one. By changing the requirements ESO manifested its desire to have those functions performed by a person with higher academic or professional qualifications, but it does not prove that the complainant, who had twenty-eight years of experience with the ESO, was unable to perform them.

16. The Tribunal notes also that when the complainant was offered the post of general administrative assistant in Paranal, it was contemplated that the post would not terminate at the end of the construction phase: it was expected to continue even thereafter, providing administrative and logistical support for VLT operations in Paranal. Furthermore, the undertaking which the Administrator then gave - to initiate a review of the grade of the complainant's post - is consistent with the recognition, even in 1995, of his ability to perform the functions of that post at a higher level of responsibility.

17. The complainant has thus shown that, *prima facie*, the functions of the new post were substantially similar to his post, and within his capabilities; and that one of the reasons why he was not selected for the new post was because - as the Joint Advisory Appeal Board concluded - the ESO and the Administrator wrongly considered him guilty of a breach of faith or abuse of authority in claiming increased rent reimbursement. On the other hand, the ESO has failed to prove that the new post did have greater responsibilities; or that it was higher in grade than the old one; or that its greater responsibilities were recognised by way of higher remuneration. It has also failed to explain what steps were taken to initiate a review of the grade of the complainant's post.

18. In the circumstances, the Tribunal holds that there was no genuine suppression of the complainant's post, and that the termination of his contract was caused mainly by an unjustified loss of confidence in him by the Administrator.

19. The ESO submits that during the early part of 1997 the future of the complainant's post was repeatedly discussed; and that when it was found that the requirements of the new post exceeded the complainant's qualifications, the Administrator and the Director of the La Silla observatory were asked to search for a post to be offered to him. It was reported that there was none, the nearest possibility being that of a warehouse administrative assistant on Paranal, which would have been open for application only in late 1999. Despite the complainant's assertion that there is no evidence that the question of his reassignment was ever considered, the ESO has to produce any internal memoranda, reports or other material pertaining to that matter. The Tribunal holds that the ESO has failed to prove that it did its utmost, and in good time (Judgment 1745, *in re de Roos*, under 7 and 8) to try to reassign the complainant.

20. The impugned decision must therefore be set aside. As for relief, the complainant has throughout been willing to accept compensation in lieu of reinstatement. Therefore the Tribunal will exercise its discretion under Article VIII of its Statute (as in Judgment 1586, *in re da Costa Campos* and Judgment 1745) to let the ESO choose between two options. It shall either reinstate the complainant with effect from 1 August 1997, or pay him compensation in a sum equivalent to three times the total gross remuneration paid for the period from 31 July 1996 up to 31 July 1997 (in addition to the termination indemnities already offered or paid by the ESO). The complainant is also entitled to interest on unpaid sums at a rate of 8 per cent per annum as from 3 July 1998, the date of the filing of this complaint, until the date of payment. If the ESO reinstates the complainant, any termination indemnities already paid will be set off against arrears of salary.

DECISION

For the above reasons,

1. The Director General's decision communicated on 28 April 1998 is set aside.
2. The ESO is directed either to reinstate the complainant or to pay him compensation, as set out in 20 above.
3. The ESO is directed to pay the complainant a sum of 2,000 United States dollars in costs.
4. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
Mark Fernando

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.