

NINETY-FIRST SESSION

In re Palma (Nos. 14, 15 and 17)

Judgment No. 2054

The Administrative Tribunal,

Considering the fourteenth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 30 September 1998, the ESO's reply of 14 December 1998, the complainant's rejoinder of 9 January 1999 and the Observatory's surrejoinder of 27 January 1999;

Considering Mr Palma's fifteenth complaint which he filed against the ESO on 5 October 1998, the Observatory's reply of 14 December 1998, the complainant's rejoinder of 18 January 1999 and the Observatory's surrejoinder of 25 March 1999;

Considering Mr Palma's seventeenth complaint which he filed against the ESO on 9 November 1998 and corrected on 11 February 1999, the Observatory's reply of 23 March, the complainant's rejoinder of 19 April and the Observatory's surrejoinder of 20 May 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings in the context of his fifteenth complaint;

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

A. The complainant served on the staff of the ESO from 1 September 1989 to 31 August 1995 as a procurement officer. Further information about his career and facts relevant to this case are set out in Judgment 1665, on his first complaint against the European Organization for Nuclear Research (CERN). Also relevant are Judgments 1718 and 1785, on his first and second complaints against the ESO. While working at the ESO he suffered an eye injury which resulted in substantial loss of sight.

In a letter of 28 March 1998, headed "general application", the complainant asked ESO's Head of Administration to order the Personnel Department to consider him automatically for any available new vacancies suited to his "education, skills and capabilities" with a view to his "reassignment" within the ESO as a handicapped person. In the absence of a reply he appealed to the Director General on 17 May 1998. In his fourteenth complaint he is challenging the implied rejection of that appeal.

On 29 March 1998, citing Article I 3.07⁽¹⁾ of the Combined Staff Rules, the complainant wrote again to the Head of Administration claiming compensation for "insult, outrage, threat, injury and slander" occurring "by reason of [his] duties" in June and July 1995. He referred to events on 28 June 1995 when two officials asked him to gather his personal belongings and "forced" him to leave ESO premises. In the absence of a reply, he appealed to the Director General on 18 May 1998 pressing his claim for compensation. In his fifteenth complaint he is challenging the implied rejection of his appeal.

At an earlier stage on 28 June 1995, the Joint Advisory Appeals Board had met to hear an appeal filed by the complainant on 13 March 1995 relating to an annual step increase. In its report of 21 July 1995 the Board found that management had not "optimally handled" the case "in what concerns the communication to the [complainant], specifically on the assessment of his performance". Part of its recommendation was to "have the failures in this case properly investigated and understood and to take action to avoid their repetition in the future". By a letter of 26 July 1995 the complainant was notified that the Director General upheld the decision not to grant him the step. He subsequently lodged a complaint with the Tribunal seeking "disclosure of information" in relation to the Board's recommendation. It was dismissed as time-barred in Judgment 1785. On 22 June 1998 the complainant wrote to the Director General appealing for a decision, in writing, following the Board's recommendation of July 1995

regarding the handling of his case. In his seventeenth complaint he is challenging the implied rejection of that appeal.

B. In his fourteenth complaint the complainant bases his claim to re-employment mainly on Article R II 1.27⁽²⁾ of the Staff Regulations, which he submits provides for reassignment of a handicapped staff member. He says that he has a right to such reassignment, particularly as his invalidity occurred while he was employed by ESO and that he was illegally terminated. In not reassigning him, the Observatory is in breach of that provision. If it re-employed him he would have access to health insurance for disability. Had he been allowed an "incapacity pension" after his service was terminated in 1995 he would have had health insurance coverage, but because he was paid "ex gratia benefits" he no longer had health insurance through ESO. He also refers to the Conventions of the International Labour Organization on disabled persons.

He asks the Tribunal to order the quashing of the implied negative decision rejecting his appeal of 17 May 1998 and oblige ESO to reassign him to a "position adequate to his skills, capabilities and "handicap"". He also claims costs.

In his fifteenth complaint he submits that he suffered "insult, outrage, threat, injury and slander by reason of his duties" in June and July 1995 on the part of officials employed in managerial positions. Under Article I 3.07 of the Combined Staff Rules he could expect "assistance" from the ESO: the Organization had the obligation to identify the authors of the misdeeds and determine what offences were committed. He contends that he was "dismissed" while his disability was still under medical evaluation. ESO "banned" him from its premises on 28 June 1995 even before it had convened "a mandatory" Rehabilitation Board. As a result he suffered physical, material and moral injury, as well as "consequential" injury in the sense that his emotional distress had repercussions on his public life and private life. There was a further breach of duty on the part of the Director General because he did not convene a Joint Advisory Appeals Board.

He asks the Tribunal to quash the implied negative decision rejecting his appeal of 18 May 1998 and order "the enforcement of ... Rule I 3.07". He also claims costs.

In his seventeenth complaint the complainant is asking for an express final decision from the Director General following the recommendation made by the Appeals Board in its report of 21 July 1995 that the "failures in this case [should be] properly investigated". He bases his claim on general principles of the Charter of the United Nations and Conventions of the International Labour Organization. He submits that in denying him an express decision thereon the Director General is in breach of his duty. He asks the Tribunal to quash the implied negative decision and award him costs.

C. In its reply to the complainant's fourteenth complaint the Observatory contends that the complaint is not well-founded in law. It points out that Article R II 1.27 applies to members of the personnel. It does not apply to former staff members and since the complainant is no longer a staff member he cannot invoke the benefits of the provision. His affliction was not service-incurred and he cannot plead that his service was terminated as a result of his handicap. Moreover, the Tribunal held in Judgment 1665 that the complainant can no longer open issues connected with the end of his appointment.

With reference to the complainant's letter of 28 March 1998, to the Head of Administration, the Observatory states that the Staff Regulations set out specific procedures for the filling of vacancies. They contain no provision for the filing of a "general application" for a vacant post. Indeed, it would amount to giving an applicant preferential treatment. In granting *ex gratia* benefits, the Pension Fund went some way towards easing the complainant's situation.

In its reply to his fifteenth complaint the Observatory asserts that the complaint is not receivable. The substantiation of a claim constitutes a condition of receivability; however, the complainant's allegations of "insult, outrage, threat, injury and slander" are not backed up by any proof and are not based on fact.

It submits that, in any event, the complaint is devoid of merit. Throughout his employment the complainant was treated according to the applicable rules, and the ESO is not aware of any "incorrect act" committed against the complainant by any of its officials. It considers his accusations as "preposterous and querulous". It cites Article R VIII 1.01 of the Staff Regulations, according to which a claim for payment is not admissible if it is made more than two years after payment became due. Even if the complainant had suffered moral injury in 1995, he had

forfeited his right to payment of compensation by the time he made his claim.

In its reply to his seventeenth complaint the Observatory says that the complaint is devoid of merit. In asking for a final decision from the Director General the complainant is merely seeking to have his case reopened. He is seeking redress for administrative decisions, taken in 1995, refusing him a step increase and terminating his contract. Those decisions are now closed matters as the time limits for bringing them for review by the Tribunal have long since expired.

D. In his rejoinder on his fourteenth complaint the complainant submits that he did not expect the ESO to act in breach of the competition procedure. He simply wanted to "compete" in the procedure, and be considered as an applicant for suitable vacancies. He maintains that the Director General should have referred his appeal of 17 May 1998 to the Joint Advisory Appeals Board.

In his rejoinder on his fifteenth complaint he presses his plea that following the insult and injury that he suffered his case should have been heard by the internal appeal body; under Article VI 1.03 of the Staff Rules the Director General has a duty to consult the Joint Advisory Appeals Board before taking a decision on his case. He argues that his claims for redress cannot be limited by Article R VIII 1.01, cited by the Observatory. That article refers to administrative claims such as salary issues, but he is seeking redress for "criminal breaches" and there is no time restriction for lodging such claims. On the grounds that he wants to avoid misunderstanding on the relief claimed he rephrases his claims. He is henceforward seeking only the quashing of the implied negative decision and costs.

In his rejoinder on his seventeenth complaint the complainant presses his pleas.

E. In its surrejoinder on his fourteenth complaint the Observatory states that the ESO rules do not contain any provision justifying the complainant's claim to be considered for vacancies. Moreover, it is not aware of any general principle of international civil service law under which his claim could succeed. It states, however, that the complainant is free to apply for any vacancy which he sees advertised.

In its surrejoinder on the complainant's fifteenth complaint it points out that, contrary to what the complainant claims, the Director General was not under any obligation to refer his case to the Appeals Board. Article R VI 1.02 of the Staff Regulations, relied on by the complainant in that connection, applies to "members of the personnel". He is not now a member of ESO's staff and was not on the staff in 1998 when the Observatory chose not to reply to his request of 29 March. The complaint is moreover time-barred. It was filed outside the time period for filing a complaint allowed under Article VII(3) of the Tribunal's Statute.

Article I 3.07 of the Staff Rules, which the complainant invokes in support of his claims regarding insult and injury, obliges the organisation to protect a staff member against injury suffered by reason of a staff member's duties. He alleges no such injury.

In its surrejoinder on the complainant's seventeenth complaint the Observatory objects to certain statements made by the complainant in his rejoinder and argues that the complainant is misusing "his procedural rights".

CONSIDERATIONS

1. The three complaints filed by the complainant with the Tribunal against the ESO, involving the same parties and a common factual background, are joined to form the subject of a single ruling.

2. The complainant entered the service of the ESO on 1 September 1989. By a letter of 26 January 1995 the Head of Personnel informed him that "... on the basis of the recommendation by the Contract Advisory Committee, it has been decided not to offer [you] an indefinite contract. ... [your] actual contract will come to its natural end and will not be renewed or extended beyond 31 August 1995." The complainant did not appeal against that decision.

In a memorandum of 6 June 1995 to the Head of Administration the complainant reported that he had lost the sight of his left eye and wanted his case to go to the Rehabilitation Board. An ophthalmologist determined the injury to be "unforeseeable and unpreventable".

3. Judgment 1665 of 10 July 1997 addressed the complaint filed by the complainant against the European

Organization for Nuclear Research (CERN) as a participant in the CERN's Pension Fund. In that complaint he sought to be awarded a pension for total incapacity and all related benefits; however, the Tribunal upheld the "*ex gratia* benefits equivalent to a partial incapacity pension of 40%" that he was awarded by the Governing Board of the CERN Pension Fund instead of an "unsuitability pension".

4. In Judgment 1718, of 29 January 1998, the complainant challenged the implied rejection of two requests, one for a post and the other for medical coverage, which he made in letters written to the Director General of ESO. He asked the Tribunal to compel the Director General to take express decisions on his requests. The complainant misunderstood the purpose of Article VII(3), of the Tribunal's Statute, which is about the implied rejection of a claim. The Tribunal dismissed the complaint on the ground that: "There is no provision for applying to the Tribunal for an order to the Director General to state a negative final decision."

5. In his second complaint filed against the ESO, which led to Judgment 1785 of 28 January 1999, the complainant asked the Tribunal to order "disclosure of information and delivery of copy of all documents" concerning his case, "following and in relation with the ESO [Joint Advisory Appeals Board's] recommendation report dated July 21, 1995". In that report the Board pointed out that in one respect his case had not been "optimally handled" by ESO management. Its recommendation was to "have the failures in [the] case properly investigated and understood and to take action to avoid their repetition in the future".

In Judgment 1785 the Tribunal dismissed the complaint. It ruled that the complainant could no longer challenge the administrative decisions at issue because the time limits for challenging them had "long since expired" and there were "therefore no grounds in law for ordering disclosure of material on [the] issues".

Fourteenth complaint

6. The complainant wrote to the Head of Administration on 28 March 1998 asking that he be "automatically" considered for "all first available vacancies at ESO, which are adequate to [his] education, skills and capabilities", with a view to his reassignment at ESO "in quality of a heavy handicapped from the Organization".

7. As he did not receive a reply to his letter of 28 March 1998, he appealed to the Director General on 17 May. Having received no reply again, he filed his fourteenth complaint against the ESO asking that the implied negative decision of the Director General be quashed.

8. In asking for reassignment, he invokes Article R II 1.27 of the Staff Regulations, national laws, Conventions of the International Labour Organization and certain legal principles.

9. In its reply the ESO points out that Article R II 1.27 of the Staff Regulations applies only to the organisation's members of the personnel and not to former staff members; that the complainant's ailments were not service-incurred; and that he was not terminated because of his handicap. In any event, the Staff Regulations recognise no right on the part of a person, not even a former staff member, to file a "general application" for a vacant post. The applicable regulations require the Director General to issue a vacancy notice for each vacant post and that it shall be published and made known to personnel of the ESO and the member States.

10. The Tribunal is unable to agree with the complainant that as a disabled former staff member he is entitled to a right to reassignment. There is no basis in the Staff Regulations for conferring on him a preferential status. As with any job applicant, he has to follow the procedures and apply for any desired vacant post. To rule otherwise would, in effect, introduce an amendment to the applicable rules to unduly favour disabled former staff members. As the Tribunal has held in Judgment 637 (*in re* Jansen) the staff (much less former employees) "may not demand amendment of the rules governing their employment". Therefore, his fourteenth complaint must be dismissed.

Fifteenth complaint

11. In a letter of 29 March 1998, addressed to the Head of Administration, the complainant claimed damages for having suffered "insult, outrage, threat, injury and slander" by reason of his duties in June and July 1995 at the hands of certain officials of the organisation, in violation of Article I 3.07 of the Combined Staff Rules which states:

"The Organization shall protect a member of the personnel, or a former member of the personnel, against any insult, outrage, threat, injury or slander to which he ... may be exposed by reason of his office or duties. ... the

Organization shall assist him in any measures which he may take against the authors of such acts.

If a member of the personnel or a former member of the personnel suffers injury by reason of his office or duties, the Organization shall compensate him ..."

12. When he did not receive a reply to his letter of 29 March 1998 he appealed to the Director General on 18 May. Having received no reply from him he filed his fifteenth complaint against the ESO asking for the quashing of the implied "negative" decision of the Director General.

13. The Tribunal finds the complainant's allegations of physical, material, moral and "consequential" injuries unsubstantiated and his arguments convoluted and baseless. Even assuming his claims were true, the acts he complains of occurred when he was still employed by ESO more than three years before he filed his fifteenth complaint; hence, his claim is irreceivable.

Seventeenth complaint

14. This complaint adverts to the one on which the Tribunal ruled in Judgment 1785.

15. The complainant charges the Director General with "breach of duty" in not taking action on the Joint Advisory Appeals Board's recommendation of 21 July 1995 to have the failures in his case "properly investigated and understood". He wants to have an express decision of the Director General to bring before the European Court of Human Rights and before "public opinion" so that he could finally have "an effective remedy for his violated fundamental human rights".

16. Since the Director General did not reply to his letter of 22 June 1998, the complainant now asks the Tribunal in his seventeenth complaint against the ESO to quash the implied negative decision.

17. The ESO submits that the complaint is devoid of merit. The complainant merely wishes to reopen his case and seeks redress for the administrative decisions taken in 1995, but the issues of fact and law in this complaint do not differ essentially from those decided by the Tribunal in Judgment 1785.

18. The Tribunal cannot but agree with the defendant organisation. Indeed, the numerous complaints filed by the complainant are but pointless attempts to get the Tribunal to review its past rulings based on actions taken several years ago. As his seventeenth complaint is clearly time-barred and unfounded it is irreceivable.

19. The Tribunal also considers that the complainant has abused the right of appeal under the Tribunal's Statute.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Catherine Comtet

1. Article I 3.07 provides in relevant part:

"The Organization shall protect a member of the personnel, or a former member of the personnel, against any insult, outrage, threat, injury or slander to which he ... may be exposed by reason of his office or duties. In so far as it deems necessary the Organization shall assist him in any measures which he may take against the authors of such acts.

If a member of the personnel, or a former member of the personnel suffers injury by reason of his office or duties, the Organization shall compensate him ..."

2. Article R II 1.27 of the Staff Regulations provides in part:

"When a member of the personnel is handicapped as a result of an illness or accident arising out of or in the course of his duties ... he shall be assigned to duties corresponding to his physical capacities."

Updated by PFR. Approved by CC. Last update: 27 July 2001.