

SIXTY-NINTH SESSION

In re DUGUET

Judgment 1038

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Bernard Duguet against the European Southern Observatory (ESO) on 26 June 1989 and corrected on 28 July, the ESO's reply of 21 September, the complainant's rejoinder of 13 November, the correction made by the ESO on 4 December and consisting in the filing of an item of evidence, the complainant's comments of 22 December 1989 on that item, and the Observatory's surrejoinder of 5 January 1990 as supplemented on 5 February 1990;

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

Having examined the written evidence and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a Frenchman who was born in 1952, is a graduate in accountancy and business management. He joined the staff of the ESO at headquarters at Garching, in the Federal Republic of Germany, on 1 October 1986 under a three-year appointment. After three months' induction he took up in January 1987 a grade 10 post as Administrator at the ESO's astronomic station at La Silla, in Chile. His wife and daughter went with him. He completed probation successfully, as his supervisor, the Head of Administration at headquarters, recorded in a largely favourable report dated 25 August 1987, and had his appointment confirmed.

As Administrator he was in charge of staff management, finance, accounting and procurement of supplies at La Silla and of co-ordination in administrative matters with other ESO duty stations in Chile, and he had authority to deal with many matters without referring to headquarters.

In a report dated 4 March 1989 the Head of Administration said that the complainant had come up to expectations, was "extremely loyal to ESO" and "very much committed to his work"; he praised his performance and behaviour and proposed a three-year extension of appointment.

Having heard that the Director-General questioned his capacity the complainant wrote him a letter on 21 March 1989 describing, among other things, personal difficulties he had had with the head of the Technical Research Support Department (TRS), who was also chairman of the Management Team at La Silla and whom he accused of being hostile.

In a letter to him of 22 March the Director-General said: "After a very careful examination of ESO's rôle in Chile in the next decade I have concluded that you do not have the capacities I consider essential for the ESO-Chile Administrator in that phase of the Organization's development. I have therefore decided not to offer you a new contract". He added that he would explain his decision more fully later, the purpose of the letter being to give notice of non-renewal in accordance with Article R II 6.03 of the Staff Regulations. ("A fixed-term contract shall expire at the end of the prescribed period. The Director-General may renew it or not, or extend it or not; his decision shall be notified to the member of the personnel at least six months before the date of expiry ...").

In a letter of 29 March the Director-General assured him that personal likes and dislikes and, in particular, the "assessment" and "preferences" of the chairman of the Management Team had not swayed his decision, which was based on his own conviction that the complainant was "not the right man" to serve as Administrator "in the next ten to twenty years". An appended memorandum dated 22 March said that he lacked "many of the capacities essential" in the "turbulent decade" that would start in 1991; the qualities which the Head of Administration had said he did have, and which the Director-General did not deny, were not enough for a post that called for "character, personality, culture, stature, sensitivity"; he lacked "too many traits" for the ESO to run the risk of keeping him on, though he would do well running "a trucking firm or a copper mine". The Director-General added that he was not taking account of two memoranda, Nos. A72 and A73, of 1989.

The post of Administrator was advertised on 6 June 1989, the deadline for applications being 1 July.

The complainant is impugning the decision of 22 March 1989, which he received on 27 March and which, according to Article VI 1.02 of the Combined Staff Rules, was not subject to appeal.

B. The complainant submits that, though discretionary, the decision not to renew his appointment shows fatal flaws.

The Head of Administration thought highly of him and unreservedly recommended extending his appointment. A letter which the former acting director of La Silla wrote to him at his request on 9 June 1989, and which he submits, said that it would have been better to extend it. The Head of Administration told him that all the members of the Management Team at Garching had been in favour of extension. Even the Director-General sent him two handwritten notes in 1988 congratulating him on his "very supportive actions" and "hard work" and in a paper submitted to the ESO Finance Committee in November 1988 praised the administration in Chile. Yet, suddenly and peremptorily, the Director-General declared that he would not do. Having met him only five times the Director-General could not properly have formed any opinion about him so strong as to rebut the favourable appraisals by his supervisor and other senior officers. Though not bound to agree with them, the Director-General must decide on the strength of specific and material facts, not mere impression or speculation. He drew mistaken conclusions from the records and overlooked essential facts.

Besides, it is hard to see how the ESO could have found the paragon the Director-General wanted in the mere three weeks that were allowed - from 6 June up to 1 July 1989 - for the filing of applications for the Administrator's post. So the decision was also contrary to the ESO's interests: it would have been better to keep the complainant on in the meantime.

There were procedural flaws. First, before making up his mind about the complainant the Director-General did not broach with him the subject of his fitness for an extension of appointment and give him a proper chance to put right any mistake of fact or wrong impression the Director-General might base the intended decision on. He was denied his right to a hearing.

Secondly, the Director-General failed to consult beforehand the management teams at La Silla and at headquarters and so acted in breach of rules he had himself set on such matters: in memorandum A279 of 21 October 1988 about "contract policy" he said that before taking a decision on renewals he would like advice from the competent management team, among others.

The complainant applies for the disclosure of memorandum A72 of 1989, which he has not seen.

He claims damages for loss of pay and prospects equal to the amounts he would have been paid had his appointment been extended by three years to 30 September 1992; damages for the moral injury he and his family have suffered, the amount to be determined by the Tribunal; an award of 7,000 Deutschmarks to cover the cost of travel to Europe to seek employment and housing and make other arrangements; and costs.

C. In its reply the ESO explains that not until the complainant had been recruited did it decide to build a very large telescope (VLT) in Chile and that the project will dominate its work for many years. When the complainant was being interviewed for the post at La Silla he was not promised a career at the ESO over that longer period. The Staff Regulations make it plain that the extension of an appointment is at the Director-General's discretion, and there was no defect in the exercise of discretion in this case.

There were no procedural flaws. Memorandum A279 applies only to the grant of indefinite appointments, not three-year ones. Since the complainant was himself a member of the management teams at La Silla and Garching there was no obligation for either team as such to discuss the extension of his appointment, though the Director-General did in fact consult the members. There was nothing sudden about the decision: the Director-General had had ample time to make up his mind about the complainant.

As to the merits, though the complainant worked well enough he was not ideal for the post and was outstanding neither in personality nor in performance. The congratulatory notes the Director-General sent him were of the kind he often sends staff to show interest and offer encouragement, and they do not prove that his work was especially good. The paper submitted to the Finance Committee praised the administrative structure in Chile, not the

Administrator's own performance.

The complainant is mistaken in suggesting that any difficulties he might have had in getting on with the chairman of the Management Team at La Silla carried weight. The true reason for the decision was, as set out in the Director-General's letters of 22 and 29 March 1989, his assessment of the ESO's needs in the years ahead. It was in the Organisation's interests to look for someone better able to cope with the many technical, administrative and other problems of setting up the new telescope and someone who would be experienced by the time the Head of Administration retired. There were sixty candidates for the post and the successful one was unknown to the ESO before it announced the vacancy.

D. In his rejoinder the complainant points out that the ESO has not yet produced memorandum A72.

He corrects what he sees as mistakes in the ESO's version. He alleges that the ESO was already planning in 1986 to build the very large telescope in Chile and indeed told him at the time that that was why the appointment of the Administrator mattered so much. Since the Head of Administration is unlikely to go before 1996 his retirement was irrelevant to the renewal of the complainant's appointment in 1989. At a meeting of the Finance Committee in Chile at the end of 1988 the Director-General publicly declared satisfaction with the complainant's performance as Administrator, as several delegates told him. The records bear out that his performance was unexceptionable.

The new Administrator in Chile is a woman in her early thirties who is no better qualified than he and lacks his experience of construction contracts.

Precedent shows that the Director-General did have the duty to consult the management teams. In any event two members of the La Silla team and all five of the headquarters team were in favour of renewal. What prompted the decision was the hostility of the head of TRS, who wanted to run La Silla himself and get rid of the complainant. The Director-General's remarks about lack of personality, culture and so on are arbitrary and not based on any fact or incident or even on any but slight acquaintance: they afford no proper grounds for a decision that was, besides, contrary to the ESO's interests.

The ESO having later produced memorandum A72, the complainant comments on it in a supplement to his rejoinder. The memorandum, which is dated 21 March 1989, was addressed by the Head of Administration to the Director-General and reports on discussions with senior officers at La Silla about the renewal of the complainant's contract; it states that the head of TRS was against any extension.

The complainant reaffirms that the Director-General decided as he did because the head of TRS disliked him, though the Head of Administration expressly advised against taking account solely of that officer's attitude.

E. In its surrejoinder the ESO maintains that the decision was properly based on the Director-General's own assessment of the Observatory's needs and of the complainant's character and abilities and on the suggestions and advice of senior staff, including the members of the management teams. It submits that his rejoinder does not weaken its case and that his allegations of procedural and substantive flaws are groundless. The qualities of his successor are no business of his.

In a supplement to its surrejoinder the Observatory answers the complainant's comments on memorandum A72: it reaffirms that the head of TRS's attitude had nothing to do with the decision, any quarrel he may have had with the complainant being irrelevant.

CONSIDERATIONS:

1. The complainant was appointed to the post of Administrator at the ESO's station at La Silla, in Chile, for three years from 1 October 1986, subject to the successful completion of probation. He answered directly to the Head of Administration at headquarters at Garching, in the Federal Republic of Germany. He also served on the Management Team at La Silla (MT/LaS), which, besides the Administrator, consisted of four heads of department: the head of the Technical Research Support Department (TRS), who was also chairman, the head of the Astronomy Department, the head of the Maintenance and Construction Department and the head of Very Large Telescope Site Services.

2. In a report he signed on 4 March 1989 the Head of Administration warmly recommended granting the complainant a three-year extension of appointment but on 13 March 1989 warned him orally that the Director-

General was not going to grant it. Having learned of the Director-General's intention, the complainant wrote him a long letter on 21 March professing his commitment and devotion to the Observatory's interests in Chile and expressing the fear that any misgivings the Director-General might have were based on vague information and unfounded statements from the chairman of MT/LaS, perhaps with support from the acting head of the Astronomy Department. He referred to incidents he had been involved in with the chairman of the team, who he said had been in conflict before with other staff and was "sometimes too emotional" and touchy. He was sorry that the chairman, who had the advantage of direct communication with the Director-General, had cast doubt on his reputation "by incomplete and one-sided information".

3. The Director-General's decision was officially notified by a letter dated 22 March which the complainant received on the 27th. The letter said that in a later communication the Director-General would try to explain the reasons for his decision. The Director-General duly wrote on the 29th a personal letter categorically assuring the complainant that personal likes and dislikes had not entered into his decision; though the complainant feared that the one-sided criticism and half-truths from the chairman of MT/LaS had played a large part, the chairman's assessment and preferences had not exerted a decisive influence on his view of the ESO's requirements in the 1990s and of the complainant's ability to meet them. The Director-General appended a detailed memorandum dated 22 March 1989 which set out the background to his decision not to keep the complainant on as Administrator. In that memorandum he discussed the ESO's expansion and needs in Chile in the 1990s, described what would be required of the Administrator and concluded that the complainant lacked many of the capacities essential for the crucial function of administration in the next decade.

4. That memorandum shows that the Director-General took his decision in the exercise of his discretionary authority. Even though colleagues of the complainant's thought him suitable and recommended extending his appointment, the decision was not theirs to make. Both the memorandum and the personal letter from the Director-General make it clear that the assessment by the chairman of MT/LaS and his preferences exerted no decisive influence on the Director-General's view of the Organisation's requirements in the 1990s and of the complainant's suitability.

5. The complainant further alleges procedural flaws. His first plea is that there was breach of his right to a hearing because the Director-General did not discuss with him his personal qualities and his suitability for the job before reaching the decision.

The plea is unsound because there was no element of disciplinary sanction in that decision, which consisted simply in not extending his appointment. The Director-General made a value judgment which did not require entering into a dialogue with him. There is no reason to hold that the Director-General was not genuine in his evaluation of the complainant's suitability for the post of Administrator or that his decision was based on any mistake of fact.

6. Secondly, the complainant submits that the Director-

General's failure to consult the MT/LaS was contrary to the procedure he himself had laid down in an internal memorandum of 21 October 1988.

The plea is mistaken because the memorandum was about the grant of indefinite contracts and the review to be made before the start of the sixth year of the staff member's regular employment. The complainant was approaching the end of his third year of employment.

7. Thirdly, the complainant cites the minutes of a meeting of MT/LaS which the Director-General attended on 7 November 1988. The minutes record the Director-General as having said that recommendations for extension of contract should be made by the head of department or group leader and submitted for discussion to MT/LaS before being passed on to the Director-

General.

It is obvious that that could not apply to one of the team's own members and that was indeed the consistent interpretation. In any event the Director-General or the Head of Administration questioned each of the members of the management teams at Silla and at Garching.

8. The Tribunal is satisfied that there are no grounds for interfering with the discretionary decision that is impugned.

DECISION:

For the above reasons,

The complaint is dismissed.

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