

## SEVENTY-FIFTH SESSION

### *In re* SCHERER SAAVEDRA

#### Judgment 1262

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Enrique Scherer Saavedra against the European Southern Observatory (ESO) on 31 August 1992, the ESO's reply of 23 November, the complainant's rejoinder of 21 December 1992, the Observatory's surrejoinder of 5 February 1993, the complainant's further submissions of 20 February and the Observatory's reply of 6 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles II 6.01, II 6.02 and VI 1.02 of the Combined Staff Rules of the ESO, Article R II 6.13 of the ESO Staff Regulations and Articles LS II 1.10, LS II 1.13, LS II 5.05 and LS VI 1.03 of the Regulations for ESO Local Staff in Chile;

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. Article LS II 1.13 of the Regulations for the European Southern Observatory's Local Staff in Chile reads:

"Local Staff Members shall receive on appointment a fixed term contract of not more than three years' duration. This contract may be renewed or extended once or more often to cover a maximum total period of not more than nine years. After this period of nine years, the Director General will grant an indefinite contract, or the contract will be terminated. ..."

The complainant, a Chilean born in 1960, joined the staff of the ESO on 3 July 1987. His appointment was for two years. He served as a locally recruited civil engineer in the operations group of the Technical and Scientific Support Department, known as TRS, at the astronomic observatory the ESO has at La Silla, in Chile, and he held step 2 in grade B1. His contract stipulated that it was governed by the Regulations for ESO Local Staff in Chile.

The notice of vacancy, No. 87/01, which had prompted him to apply to the Observatory for employment said that the holder of his post would "actively participate in different functions of preparing and maintaining the scientific instruments" and was intended for "professionals who can bring their initiative and creativity to optimize the operation of the instruments". After six months' probation he had his appointment confirmed on 22 December 1987.

On 19 April 1989 the head of TRS reported favourably on his performance but said that sometimes "his work was lacking the proper amount of care to be fully satisfactory, resulting in a number of complaints from users", and he would warn him orally to be "more meticulous". He was granted three years' extension of appointment from 2 July 1989.

Some time before 7 May 1991 the complainant drafted a new description of his post which said that it required him "to be completely familiar with the operation ... of all the instruments". His supervisor, the head of TRS, signed that description.

In a report of 15 May 1992 on his performance his supervisor observed that his interest in his work and others' confidence in him had declined; unlike other members of the group he "would not get involved" in the many "background tasks" required to ensure the efficient working of scientific instruments; his work was strictly confined to "instrumentation change-over tasks" and "quick on-line functional checks". The conclusion, based on assessments by his supervisors, was that he was not suited for the post and his performance did not warrant any extension of appointment.

In a letter of 18 May 1992 he asked the head of TRS to tell him of any decision that was taken about his fate, say who had taken it and let him have an explanation. In a letter of 20 May the Head of Personnel answered that his appointment, which was to expire at 2 July 1992, would not be renewed and that the head of TRS had already explained the reasons to him. He also asked the complainant to treat the letter as giving notice of termination.

In a letter of 21 May the complainant repeated his request of 18 May. In his reply of 4 June the head of TRS stated the reasons for non-renewal: the group, he said, needed committed people who were interested in becoming familiar with the scientific instruments; the report of 15 May had shown that he was not up to the mark and that to keep him on would be frustrating for both sides.

In a letter of 29 May 1992 he had appealed against the decision not to extend his contract, but in a letter of 30 June, the decision he impugns, the Head of Administration told him that in accordance with Article VI 1.02 of the Combined Staff Rules and Article LS VI 1.03 of the Local Staff Regulations no appeal lay against non-renewal of a fixed-term appointment.

B. The complainant has three main pleas.

First, he submits that his "dismissal" is wrongful because it rests on misappraisal of the facts: his supervisors should have assessed his performance according to the description in vacancy notice 87/01 and his personnel records show that he worked satisfactorily. He believes that the purpose of getting rid of him was to recruit in his stead an engineer who was willing to operate the instruments. He points out that a vacancy notice of 12 July 1992, No. 92/03, which went out after he had left, was the same as the one of 1987 but for the addition of responsibility for "operation of the scientific instruments".

Secondly, the ESO failed to give him the period of notice required by the Combined Staff Rules: the final decision not to renew his appointment beyond 2 July 1992 was conveyed to him in the Head of Administration's letter of 30 June 1992.

Thirdly, the decision was prompted by his involvement in staff activities.

He asks the Tribunal to set aside the decision of 30 June 1992 and order his retroactive reinstatement or, failing that, award him three years' gross pay in damages for "loss of career prospects and moral injury". He seeks costs.

C. In reply the ESO submits that a decision to extend or not to extend an appointment is a discretionary one according to Article LS II 1.13 of the Local Staff Regulations and that the Tribunal may therefore interfere with the ESO's decision in this case only if it shows one of the flaws which the case law acknowledges as fatal.

Although the complainant's performance was below par even before he got his first extension, the ESO still thought he could do better. But by doing as little as he could get away with he showed that he did not come up to the requirements of vacancy notice 87/01 or even of the job description he himself had drafted in May 1991. Even if that description had altered in substance the nature of his original duties - though it did not - that would have been in line with Article LS II 1.10 of the Local Staff Regulations, which requires "a written amendment accepted and signed by both parties" for any change to be made in the terms of contract. There were acceptance and signature in this case.

The ESO denies wanting to amend the nature of his duties: the post it offered in notice 92/03 was the same as the one to which notice 87/01 referred and it still exists within the operations group.

The decision that the complainant ought to have challenged was, not the Head of Administration's letter of 30 June 1992, but the Head of Personnel's letter of 20 May 1992. His appointment was to expire at 2 July 1992, and the decision not to renew it was in the letter of 20 May, which was handed to him the next day. So he was given due notice within the time limit in Article LS II 5.05 of the Local Staff Regulations.

His involvement in staff activities had nothing whatever to do with the decision: the fact of the matter was that, unlike the other members of the group, he simply did not come up to standard.

D. In his rejoinder the complainant enlarges on his pleas. He rejects the ESO's contention that its decision not to extend his appointment was purely discretionary, pointing out that the Local Staff Regulations used to provide that the maximum duration of a fixed-term appointment was six months and that if someone was kept on longer the duration of the appointment automatically became indefinite. Although despite the staff association's opposition the ESO amended that rule it does not have unfettered discretion.

As the job description of May 1991 suggests, he did have to know how the instruments worked, but he was not

called upon to operate the equipment or perform other tasks. His supervisors made the last assessment of his performance under the misconception that his duties included those that were incorporated, after he left, in notice 92/03. In any case the ESO should have let him see the comments of other supervisors who had adversely assessed his performance.

The ESO did not give him sufficient notice of non-renewal. Under Article R II 6.13 of its Staff Regulations international staff are entitled to three months.

The ESO did not find fault with him until he became, as he describes himself, "one of the most active local staff defenders of labour conditions" and took an active interest in the local staff magazine. "ESO prepared", he says, "an ad hoc biased assessment of [him] with the real purpose of getting rid of him", and he cites two other examples of such abuse of authority.

E. In its surrejoinder the ESO observes that it is not claiming unfettered discretion in the renewal of fixed-term appointments. Besides, since the complainant was under contract only from 1987 the earlier version of the Local Staff Regulations that he relies on is immaterial.

The complainant's interpretation of the rules on notice is mistaken. Though they do provide for notice in cases of resignation and dismissal, the expiry of a fixed-term contract is another matter. Notice is no more necessary in such a case - where the parties know well in advance of the critical date - than notice of retirement on reaching the age limit.

The assessment of the complainant's performance was properly made by the head of TRS and two of his supervisors. There is not a jot of evidence to bear out his allegation that the decision was prompted by his staff activities or contributions to the staff magazine. In point of fact he was never a staff representative, and his references to two other cases are irrelevant.

F. In a further brief the complainant cites a letter of 5 February 1993 from the Director General to two ESO staff members suspending them from duty and informing them of the institution of proceedings for dismissal. In comments thereon the ESO reaffirms that the case of the two other staff members is unrelated to this one.

#### CONSIDERATIONS:

1. The complainant joined the staff of the European Southern Observatory at its installations at La Silla, in Chile, on 3 July 1987 as a locally recruited civil engineer. He held an appointment for two years which included six months' probation. His appointment was extended by three years to 2 July 1992. By a letter dated 20 May 1992, which he received the following day, the ESO informed him that it did not intend to extend his contract, which would therefore end at 2 July.

2. The complainant's main pleas are (1) that the refusal to extend his contract was unjustified, being based on conclusions wrongly drawn from fact; (2) that the notice he was given of non-renewal did not comply with the requirements of the Combined Staff Rules; and (3) that the ESO's real purpose was to get rid of him because of what he calls his "labour condition improvement activities".

3. In accordance with Article LS II 1.13 of the Regulations for ESO Local Staff in Chile such staff are granted on recruitment a fixed-term contract for not more than three years. It may be extended once or more often up to a total period of not more than nine years. Thereafter the Director General will either terminate the contract or grant an indefinite appointment. Article II 6.01 of the Combined Staff Rules further provides that appointments shall terminate on account of resignation, expiry of fixed-term contract, death, reaching the age limit or dismissal.

4. The case law has made it consistently plain that a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. Moreover, when the reason given for non-renewal is unsatisfactory performance the Tribunal will not replace the organisation's assessment of the complainant's fitness for his duties with its own.

The allegedly mistaken conclusions

5. In the report dated 19 April 1989 on the complainant's performance in the first two years the head of TRS commented that his work was sometimes "lacking the proper amount of care" and though he was to be offered a three years' extension the head would warn him orally to be "more meticulous in his duties". The evaluation that the head of TRS made of him on 15 May 1992, after he had spent almost five years on the post, observed that his interest in work had "declined noticeably", that his work was "strictly confined to the instrumentation change-over tasks and the quick on-line functional checks" and that he was "not suited for his post".

6. The complainant argues the ESO drew mistaken conclusions from the facts in that it was not free to have him perform tasks other than those provided for under the terms of his contract or to take an active part in operating the technical equipment.

7. A description of the complainant's post that was written before 7 May 1991 and that he himself signed included what were called "background activities", and they went beyond the tasks that had originally been required of him. The Tribunal is satisfied that by confining himself to "instrumentation change-over tasks" and "quick on-line functional checks" he displayed a lack of commitment which properly put at issue the question as to whether the Observatory should extend his contract. The ESO not having drawn plainly mistaken conclusions about his performance from the evidence, his plea fails under this head.

The period of notice

8. In support of his contention that he was not given sufficient notice of termination the complainant relies on Article II 6.02 of the Combined Staff Rules of the ESO and Article R II 6.13 of the Staff Regulations, which stipulates a three months' notice of termination of a fixed-term contract.

9. Article II 6.02 states that the period of notice, among other things, shall be laid down in the Regulations. But the "Staff Regulations", as the ESO observes, do not apply to local staff members like the complainant, who come under the Regulations for ESO Local Staff in Chile, and he is therefore mistakenly seeking to put himself on a par with the Observatory's international staff.

10. Article LS II 5.05 of the Regulations for Local Staff reads:

"A fixed-term contract shall expire at the end of the agreed period, unless it is extended. The extension of the contract has to be communicated in writing to the Local Staff Member concerned by the person designated by the Director General 30 days prior to the termination of contract."

Inasmuch as the letter of 20 May 1992 from the head of Personnel, which the complainant got the next day, told him that his appointment would not be extended beyond 2 July he was duly given the period of notice prescribed in LS II 5.05, the material rule.

The complainant's staff activities

11. The complainant was involved in the layout and design of the staff magazine, which, he says, was at times critical of the ESO. He cites the cases of two officials of the staff association who were also involved in the publication of the magazine and against whom disciplinary proceedings have been brought with a view to dismissing them for sending a letter to a member of the Chilean Senate about negotiations pending between the ESO and the Government.

12. The charge of victimisation, which is easy enough to make, has to be supported by serious evidence. The complainant has failed to discharge the burden that lies on him to prove the charge against the Observatory. For one thing, he was not even an official of the staff association. For another, his allegation that he was victimised merely because he helped with the publication of the magazine is unsupported by a shred of evidence. Lastly, his reference to the treatment of two other staff members is merely speculative and adds no weight to his contention.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
William Douglas  
Mella Carroll  
A.B. Gardner

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