

## EIGHTY-NINTH SESSION

*In re Palma* (No. 11)

Judgment No. 1950

The Administrative Tribunal,

Considering the eleventh complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 27 July 1998, the ESO's reply of 15 October, the complainant's rejoinder of 2 November and the Observatory's surrejoinder of 4 December 1998;

Considering Articles II, paragraph 5, and VII 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, an Italian national, served on the staff of the ESO from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

A decision was taken on 26 January 1995 not to renew the complainant's contract when it expired on 31 August. In a letter of 30 June the Head of the Personnel Department informed the complainant of his entitlement to indemnities upon the termination of his contract. Paragraph b) of the letter states "in accordance with Annex R A 10, page 4 of the Staff Rules and Regulations (edition 1 July 1983) you are entitled to a reinstallation grant amounting to 4 months' basic salary provided that a removal has been carried out and on the condition that either your spouse or at least one dependent child has taken up residence in your new abode". The complainant acknowledged receipt of the above in a letter of 5 July 1995 stating that he considers any payment of indemnities as "preliminary", reserving "final acceptance".

On 1 August 1997 the complainant wrote to the Director General requesting a waiver of the time limit under "Article R IV 1.43 of the ESO Rules and Regulations, i.e. concerning the indemnity of 'Removal Expenses'". Nevertheless, he contends that he carried out the removal before the end of the month. On 3 September 1997 the Head of Administration informed him that a waiver for claiming removal expenses had been granted until January 1998 even though the Director General had no obligation to do so under the exceptions specified in that Article. On 12 September 1997 the complainant acknowledged the extension, closing his letter with a hope that his "'removal' and related indemnity issue" might be resolved in a friendly manner. On 15 January 1998 this waiver was extended for an additional three months by the Head of Administration, pending Judgment 1718 which had not yet been delivered.

In a letter of 20 March 1998 the complainant wrote to the Head of Administration claiming his "indemnity of removal". Attached to his claim were copies of certificates of residence in Reggio Emilia, Italy, for himself and his two children, a fax from the moving company confirming the removal date, and an "invoice" in Italian from the same company acknowledging payment on 20 August 1997: no amount was indicated on the invoice. On 26 March 1998 the Personnel Services informed the complainant that he had not met the conditions of Article R A 11.02, point 1. Two reasons were given: he still indicated the same address in Germany and he did not provide proof of evidence that the removal was carried out. He responded in a letter of 29 March that he had mailed "all demanded documentation certifying [he] performed a removal and took residence beyond 20 km from [his] previous place of residence". Furthermore, he stated that the certificates of residence in Italy could only be obtained upon "sudden inspection of the municipal police at your address certifying your presence". He also provided the ESO with his mailing address in Italy. The ESO did not respond to the complainant's letter.

On 16 May the complainant appealed to the Director General claiming the "indemnity of removal" he had

requested on 20 and 29 March. He invited the Director General to consult the Joint Advisory Appeals Board or to make a final decision by 16 July 1998. The complainant is impugning the implied rejection of his appeal.

B. The complainant contends that he complied with the applicable rules of the ESO. Article R IV 1.43 of the Regulations states that a staff member shall "be entitled to reimbursement of removal expenses if the removal takes place during the two years following ... the termination of his appointment if the distance in a straight line is 20 km or more". Article R A 11.02 provides for the entitlement of a reinstatement indemnity when "the provisions of Article R IV 1.43 [are] applicable to the member of the personnel, i.e. he [has] carried out a removal". The amount of the indemnity is higher for recipients of a household allowance, provided that "at least one member of the family (Article R IV 1.14) has taken up residence with the member of the personnel". For the purposes of this rule an unmarried child over 18 and under 25 years of age satisfies the definition of "member of the family". The complainant provided documentation showing that he had moved during the month of August 1997 and that he shared the same address in Italy with his two children, one of whom satisfies the requirements of Article R IV 1.14.

As for the German mailing address, he explains that he preferred to keep the same address for simplifying the correspondence regarding his numerous complaints to the Tribunal. Nevertheless, he had previously provided the ESO with his postal address in Italy.

The complainant contends that there are no rules stating how the physical removal and change of residence must be documented, and that he has provided the ESO with sufficient proof of his compliance with the applicable rules and regulations. He says that this is another open affront made against him by the ESO.

He asks the Tribunal to quash the implied rejection of his appeal against non-payment of the "indemnity of removal" and award him moral damages and costs.

C. In its reply the ESO points out that in each of his eleven complaints the complainant has given the same address in Germany. His name still appears on the door and the telephone book shows the same address and telephone number. In addition, the competent community registrar shows that the complainant is still registered in Germany.

It argues that the complainant's claim is to payment of the reinstatement indemnity according to Articles R IV 1.58 and R A 11.02 of the ESO Staff Regulations and that he does not request reimbursement of removal expenses. Had he met the statutory requirements he would have been entitled to four months' basic salary. However, the complainant has not provided sufficient proof of a removal. It argues that "he must show that he carried out the removal in accordance with the specific formal and substantive conditions of the Staff Regulations, such as set out in Art. R IV 1.50" and it contends that such proof has not been submitted to the Organisation.

The ESO argues that it still has good reason to believe that the complainant continues to live in Germany and that he uses the home of his daughter in Italy "as a subterfuge"; the invoice he submitted as proof of his removal is inconclusive because it does not mention the cost; and the Italian certificate of "family unit" does not mention his wife.

Finally, it pleads that the claim for payment of the reinstatement indemnity would be forfeited on any account. In order to qualify for this indemnity, the removal had to take place no later than 31 August 1997, and according to it the complainant had requested a waiver after this date. By his letter of 15 January 1998 the Head of Administration extended again the time limit for claiming removal expenses but not for claiming the reinstatement indemnity.

D. In his rejoinder the complainant seeks to refute the defendant's pleas which he finds insulting and outrageous. He says that "coming even to investigate the nameplate on the door" proves an "espionage made in [his] private life" on the part of the defendant. He argues that the ESO rules do not impose a change of postal address, but a removal; they do not require that a wife must follow her husband, but only specify that the staff member and one member of the family must change "formal" residences. The rules do not require the "physical elimination" of former staff members from the surrounding area. Furthermore, neither German nor Italian law prohibits multiple residences.

The complainant points to the ESO's letter of 30 June 1995 which stated that he was entitled to the reinstatement grant of four months' basic salary on the condition that a removal has been carried out and that either his wife or one dependent child has taken up residence in the new home. The payment for removal expenses and the reinstatement grant being "strictly linked" in Article R A 11.02 point 1, a claim for removal expenses can also be

seen as a claim for the reinstatement grant thereby constituting what he calls the "removal indemnity". In addition, his own letter of 5 July 1995 informed the ESO that he would "consider the payment of all ... indemnities 'preliminary'" until a final decision on his case by the Tribunal. He argues that he has nevertheless "executed required removal and claim" in conformity with ESO rules.

He presses his arguments and argues in addition, that the Observatory did not cite Article R IV 1.50 as a reason for rejecting his claim on 26 March 1998.

E. In its surrejoinder the ESO raises a question of receivability: it objects to the complainant's broadening his original claim in the rejoinder. It contends that while the complaint initially "concerned the payment of the removal *indemnity* (reinstatement grant) and not the payment of the removal *expenses*" he now defines his claim to be for a "removal indemnity, i.e. removal expenses joined with the reinstatement grant". It understood "indemnity of removal" to mean payment of the reinstatement grant and not the reimbursement of any removal expenses.

## CONSIDERATIONS

1. The complainant claims from his former employer, the ESO, a "removal indemnity" in accordance with the terms of Articles R IV 1.42, R IV 1.43 and R A 11.02 of the Staff Regulations. The relevant texts read as follows:

"Article R IV 1.42

When a member of the personnel travels to take up an appointment, on being transferred or reassigned to another duty station, on termination of his appointment, or on duty for a period of six months or more, the Organization shall reimburse the cost of transporting up to 30 kg of luggage per person by air freight from the airport of departure to the airport at the destination.

Article R IV 1.43

A member of the personnel entitled to the reimbursement of travelling expenses shall also be entitled to reimbursement of removal expenses if the removal takes place during the two years following:

- a) his appointment if the distance in a straight line is 20 km or more;
- b) his transfer or reassignment to another duty station;
- c) the termination of his appointment if the distance in a straight line is 20 km or more;

except when his contract is for less than 12 months [cases a) and c)] or when he resigns during the first year [case c)], unless the Director General waives these restrictions. This entitlement shall be reduced if the Organization provides furnished housing at conditions to be specified by the Director General.

Article R A 11.02

Upon departure, a member of the personnel shall be entitled to payment of the indemnity indicated in the table below provided that:

1. The provisions of Article R IV 1.43 were applicable to the member of the personnel, i.e. he carried out a removal on his departure from the Organization ..."
2. Prior to the expiry of his term of employment at the ESO, the complainant resided in Germany. He continued his German residence after ceasing to be a member of the staff of the ESO. He has continued to indicate his address in Germany in his dealings with the ESO and on his various complaints to the Tribunal including the present one. He is registered with the competent authorities as a resident of the municipality of Neubiberg in Germany.
3. His claim to a "removal indemnity" is based upon the production of an invoice from a company apparently showing the carriage of certain effects to an address in Italy and a certificate from the Italian authorities showing that the complainant is also registered with the municipality of Reggio Emilia as a resident of that city in Italy.
4. The defendant denies the complainant's claim on the grounds that the evidence, coupled with the fact of the

complainant's continued residence in Germany, was not sufficient to establish his entitlement to a "removal indemnity". Upon the complainant's appealing against such denial to the Director General and the latter's failure to provide a timely reply thereto, the complainant appealed to the Tribunal against the implied negative decision.

5. The complainant admits that he has a German residence where his wife resides and which he continues to show as a postal address in his dealings with his former employer and with the Tribunal. He claims that he has established a second residence in Italy and this fact entitles him to the "removal indemnity" which he has demanded.

6. It is not entirely clear from the complainant's original brief whether he is claiming reimbursement of removal expenses under Article R IV 1.43 of the Regulations or the payment of a reinstatement indemnity under Article R A 11.02. In his rejoinder the complainant attempts to remedy this by adding a clear claim to reimbursement of removal expenses. The defendant objects to this as an improper attempt by the complainant to alter the basis of his claim. It also objects to the claim for a reinstatement indemnity as being out of time since, unlike the claim for reimbursement of removal expenses, the ESO did not grant any extension to the complainant in this respect.

7. The Tribunal does not find it necessary to deal with these objections and prefers to deal with the claim on its merits.

8. It is obvious from a reading of the Regulations above that payment of the reinstatement indemnity is contingent upon the complainant being entitled to claim reimbursement of removal expenses. It is likewise clear that the latter reimbursement is in its turn dependant upon the person claiming it having carried out a removal from his former residence.

9. In these circumstances the claim cannot succeed. So long as the complainant retains his residence in Germany, no matter how many other residences he may have established, he has not carried out a removal from that residence. A removal is not merely the establishment of a new residence but, and much more importantly, the abandonment of the former residence. On the complainant's own showing, he has not done so but continues to make use of it, both for the purposes of lodging members of his immediate family and for the purpose of conducting his business dealings.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet