

NINETY-SECOND SESSION

In re Kretschmer

Judgment No. 2091

The Administrative Tribunal,

Considering the complaint filed by Mr Gerhard Paul Kretschmer against the European Southern Observatory (ESO) on 13 October 2000 and corrected on 12 January 2001, the ESO's reply of 5 March, the complainant's rejoinder of 11 June, and the Observatory's surrejoinder of 5 July 2001;

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. Under an agreement concluded in 1968 between the ESO and the European Organization for Nuclear Research (CERN), as revised in 1983 and again in 1991, the staff of the ESO are participants in the Pension Fund of CERN.

The complainant, a German national born in 1951, was employed as a mechanical engineer on a three-year contract with the ESO which commenced on 1 May 1994. He was assigned to the Paranal Observatory in the Chilean Andes. On 25 October 1996 his contract was extended until 30 April 1998. On 14 October 1997 he had an accident while on duty, fracturing his right wrist and bruising his left knee. Having obtained the prior consent of the ESO Administration, he returned to Germany on 20 October for a convalescence period. On 28 October the complainant was informed by a letter from an official in Personnel Services that his contract would not be renewed upon its expiry on 30 April 1998.

While on his way to a medical appointment on 23 December 1997 the complainant had a second accident. On 19 January 1998 his doctor transmitted a medical report to the ESO medical adviser and Van Breda (the ESO's insurance brokers), stating that the complainant had "a long-term inability to resume work", that he may need surgery and that the second accident was essentially a direct result of the first one. On 1 April 1998 his doctor issued a second medical report, estimating the complainant's disability at 40 per cent according to the applicable German standards. On 18 April the complainant informed the ESO Personnel Services of the content of the medical report and requested that his case be submitted to the Rehabilitation Board.

In its report dated 13 November 1998 the Board considered that the complainant should be compensated for the consequences of his accident. It recommended, in particular, that in the event retraining the complainant for another type of work did not prove feasible, then a review of the non-extension of his contract should take place with the purpose of implying dismissal for medical reasons so that a total incapacity pension would be payable to him under the CERN Pension Fund. By a letter of 9 April 1999 the Head of Administration informed the complainant, on the Director General's behalf, that the ESO had concluded that it was the CERN Pension Fund that should determine if and to what extent he would be entitled to an incapacity pension. Having received a draft of this letter, the Administrator of the CERN Pension Fund informed the Head of Administration at the ESO the same day that the conditions set by the Rules of the Fund for providing the complainant with an incapacity pension were not met unless the ESO changed the reason for his termination to that of medically confirmed incapacity.

The complainant appealed against the decision of 9 April to the Joint Advisory Appeals Board. In a report dated 26 November 1999 the Board recommended, *inter alia*, that the reason for the complainant's termination be changed to dismissal for medical reasons and that the ESO actively support the complainant in obtaining an incapacity pension from the CERN Pension Fund. On 25 January 2000 the complainant was informed that the Director General's decision of 9 April 1999 was maintained.

On 19 April 2000 the three parties signed the following Settlement agreement:

"In order to solve the issue of the payment of an incapacity pension by the Pension Fund of the European Organization for Nuclear Research (CERN) to [the complainant], former staff member of the European Southern Observatory (ESO), victim of a professional accident in the course of his contract with ESO, and whose contract expired on 30 April 1998,

CERN, ESO and [the complainant] agree on the following settlement:

1. ESO, with effect from 1st May 1998, replaces the reason of termination of [the complainant's] contract by a dismissal owing to disability confirmed by a medical certificate ...
2. As [the complainant's] state of health was confirmed to be consolidated and the degree of his incapacity fixed at 100% on 19 December 1999 only, the CERN Pension Fund will pay retroactively, as from 1st December 1999, to [the complainant] a total incapacity pension following chapter II, section 3, of the Rules of the CERN Pension Fund, plus allowances.
3. [The complainant] is entitled to keep the unemployment benefits paid by ESO.
4. Within three months (starting date 1st May 2000), ESO takes the necessary measures to allow [the complainant] to be insured with the ESO health insurance company, van BREDA.
5. [The complainant] accepts this solution as a final settlement of his rights towards ESO and the CERN Pension Fund and renounces any further claims towards ESO and the CERN Pension Fund in connection with the termination of his contract with ESO and his state of health.

This settlement takes effect with the signature of the three parties involved."

The Head of Administration wrote to the complainant on 11 May 2000 offering him an arrangement in compliance with paragraph 4 of the Settlement and in accordance with Title I, Article 5 B 3 of the ESO Group Insurance Contract so that he would benefit from medical coverage against payment of a premium. The premium would need to be paid in one lump sum in advance for six months, and certain coverage would be excluded. A copy of the Group Insurance Contract was attached and the complainant was asked to inform the Administration whether he would accept the offer. He replied on 22 May that, according to Title I, Article 3, paragraphs 5 and 6, and Title III, Article 14 of the Group Insurance Contract, as long as he benefits from a total incapacity pension he should be exempted from payment of any premiums and all previous guarantees should continue to apply; he asked that such coverage be secured for him by the ESO. He attached to his reply a copy of a letter from Van Breda to the Head of Administration at the ESO, dated 16 July 1998, in which it asked to be kept informed about any decisions by the CERN Pension Fund since Article 14 might become applicable to the complainant's case. On 2 June 2000 the Head of the Personnel Department informed the complainant that Title III, Article 14 concerns only those members of the personnel who, on the date on which their pension takes effect, are insured with Van Breda and thus cannot be applied to the complainant. The offer of 11 May 2000 was maintained.

In a letter of 10 July 2000 the complainant appealed to the Director General against the decision to refuse him the premium waiver. On 19 July the Head of Administration replied to the complainant on the Director General's behalf, expressing serious doubts as to the receivability of the appeal, as the complainant was no longer a staff member, and that the Administration did not believe that an internal appeal procedure was the appropriate way to handle his request. That is the impugned decision.

B. The complainant challenges the lawfulness of the decision of 19 July 2000. He considers that the ESO is attempting to escape from its obligations.

He argues first that the impugned decision is based on an error of law. The condition in paragraph 4 of the Settlement agreement - "to allow [the complainant] to be insured" - must be construed as to "allow [the complainant] to be insured according to the relevant applicable rules". The relevant rules are those found in Addendum 1 (concerning accidents on duty and occupational illnesses) to the Group Insurance Contract, since it cannot be contested that the complainant's state of health has been caused by an accident while on duty.

Secondly, the impugned decision is in breach of the principle of good faith. The Observatory's position constitutes an attempt to prevent him from benefiting from that which he is legally entitled following recognition of his disability.

The complainant says that he has suffered financial and moral injury through the ESO's actions. He has also been placed in an uncertain situation, as there is no guarantee under Title I, Article 5 B 3 of the Group Insurance Contract that his coverage will continue as long as he receives an incapacity pension. There is such a guarantee under Article 3 B 3 of Addendum 1.

He asks the Tribunal to quash the Director General's decision of 19 July 2000 and to order the Observatory to take the necessary measures to provide him and his family with health insurance coverage, to be continuous and free of premium during the period for which he is awarded a disability pension and, once he is in receipt of a retirement pension, at the cost which Van Breda guarantees to former ESO employees covered by its insurance until the age of retirement. He also requests the Tribunal to award him moral damages and costs.

C. In its reply the Observatory contends that the only question in dispute is whether the Settlement agreement obliges the ESO to provide the complainant with free health insurance through Van Breda. Pursuant to the Settlement, the Observatory contacted Van Breda which consented to a special arrangement for him under Article 5 B 3 of the ESO's Group Insurance Contract. The complainant rejected the offer. Van Breda did not consent to a premium waiver because the complainant was not insured under the Group Insurance Contract at the date on which the pension took effect.

The Observatory argues that the complaint is not receivable because the complainant is neither alleging non-observance of the terms of his contract nor of the provisions of the ESO International Staff Rules and Staff Regulations. His claims are based on a trilateral agreement concluded between himself, the ESO and the CERN Pension Fund, and the Tribunal has no jurisdiction over this matter. However, in the event that the Tribunal considers itself competent to adjudicate the dispute, the complainant's claim of being awarded, upon reaching the age of retirement, health insurance under the same conditions as retired ESO staff members is an entirely new claim which was not raised in the internal appeals procedure.

The Settlement concluded between the three parties does not establish an obligation for the ESO to provide the complainant with the benefits he seeks. The text of paragraph 4 of the Settlement neither obliges the ESO to be successful with its effort to provide the complainant with health insurance nor does it define the financial conditions under which the insurance should be placed. In any event, paragraph 5 provides that the Settlement is final and that the complainant expressly renounces any further claims against the ESO. The Observatory points out that the complainant had been assisted by his legal adviser during negotiations, who found the text to be clear and without flaws.

D. In his rejoinder the complainant contests the Observatory's arguments on the receivability of his complaint and submits that it falls within the scope of Article II of the Tribunal's Statute. Furthermore, he contends that the claim for relief which the ESO contests derives directly from the requests made in his letter of 22 May 2000 to the Head of Administration and that his appeal was lodged against the decision of 2 June in response to his requests.

The complainant contends that the Observatory has tried to mislead the Tribunal by stating that paragraph 4 of the Settlement does not define the financial conditions under which the insurance would be placed. Van Breda is specified in the paragraph and therefore "the provisions to apply are clearly those contained in ESO Group Insurance Contract with Van Breda and its Addendum 1". Paragraph 1 of the Settlement replaced the reason for the complainant's termination by a dismissal for disability, as from 1 May 1998. Thus, the complainant never ceased to be insured according to Article 2 A Category 1 of Addendum 1 of the Group Insurance Contract, which provides that "members of personnel who are affiliated to the CERN Pension Fund are covered for Medical Expenses resulting from accidents on duty or occupational illnesses and benefit from the continuation of guarantees, stipulated in Article 3.B.3 of this addendum". Any argument to the contrary would constitute another attempt by the Observatory to escape its responsibility and shift the burden of responsibility to another body. It is the ESO and not the complainant who should bear the consequences of the mistakes made in this case.

E. In its surrejoinder the ESO states that it has not tried to mislead the Tribunal: it simply does not share the complainant's view of the facts and the law. It points out that the complainant has not been without health insurance, as he has been insured under that of his wife.

The complainant did not appeal the decisions taken by the ESO prior to the trilateral agreement, so the Settlement constitutes the only legal basis on which the complainant may base a claim against the Observatory. As this

agreement involves neither the non-observance of his terms of appointment nor that of the Staff Regulations, the ESO presses its argument that the complaint is not receivable. The complainant's interpretation of paragraph 1 of the Settlement does not correspond to the principles of good faith governing the interpretation of contracts. Since the Settlement awarded the complainant the incapacity pension retroactively as from 1 December 1999, at the time he signed it he was in fact and in law not affiliated to the ESO health insurance.

CONSIDERATIONS

1. The complainant was employed as a mechanical engineer at the ESO's Paranal Observatory in Chile on a three-year fixed-term contract from 1 May 1994 to 30 April 1997; his contract was later extended to 30 April 1998.
2. On 14 October 1997 he suffered an accident while on duty at the Paranal site. He returned to Germany for a convalescence period and he suffered a second accident on 23 December 1997. The non-renewal of the complainant's contract, which ended on 30 April 1998, was not appealed and he was paid end of service grants. Under the ESO Staff Regulations he was entitled to unemployment benefits for a maximum of fifty weeks and also to be affiliated to the ESO's health insurance scheme administered by the insurance brokers Van Breda, with the Observatory paying total contributions.
3. Exceptionally, his entitlement to unemployment benefits and free health insurance coverage was extended for three months to 15 July 1999 as no decision had been taken regarding the complainant's entitlement to an incapacity pension from the CERN Pension Fund.
4. On 15 July 1999 the complainant's unemployment benefits ceased. On 1 July 1999 he had been offered continued health insurance coverage for nine months at his own expense, but he refused this.
5. Meanwhile, at the request of the complainant, a Rehabilitation Board had been constituted on 15 June 1998. In its report dated 13 November 1998, the Board recommended that, if retraining the complainant for other work was not feasible, then a review of the non-extension of the complainant's contract should take place with the purpose of implying dismissal for medical reasons, if this would allow a total incapacity pension to be paid by the CERN Pension Fund.
6. In a letter of 9 April 1999 the complainant was informed by the Head of Administration that the Director General had decided against reviewing the decision of 28 October 1997 not to renew the complainant's contract and decided that the CERN Pension Fund should determine if and to what extent the complainant would be entitled to an incapacity pension. That decision was appealed on 2 June 1999 and the Joint Advisory Appeals Board recommended on 26 November 1999 that the ESO should review the reasons for non-extension of his contract and actively support the complainant's application to obtain an incapacity pension. The Director General decided on 25 January 2000 to maintain that decision.
7. Negotiations between the complainant, the CERN Pension Fund and the Observatory led to the conclusion of a Settlement which was signed by the three parties on 19 April 2000. (The terms of this Settlement are set out in A.) The complainant was advised throughout the negotiations by the lawyer representing him in this complaint.
8. Pursuant to the Settlement the Observatory contacted Van Breda regarding insurance coverage for the complainant. Van Breda consented to a special arrangement to insure the complainant against a premium of 10.8 per cent of his last monthly basic salary. Van Breda did not consent to a premium waiver since the complainant was not insured under the ESO Group Insurance Contract at the date on which the pension took effect.
9. In a letter of 22 May 2000 the complainant contended that he should be exempt from paying a premium as long as he was benefiting from an incapacity pension; he asked the ESO to secure such coverage from Van Breda. The Observatory explained in a letter of 2 June 2000 why he could only be insured under the conditions mentioned. The complainant appealed on 10 July 2000 to the Director General. In a letter of 19 July 2000 the Head of Administration replied on the Director General's behalf, expressing doubts as to the receivability of the appeal as the complainant was no longer a staff member, and because the subject matter referred to the interpretation of a trilateral agreement between the complainant, the ESO and the CERN Pension Fund. That is the decision impugned.

10. The ESO submits the complaint is not receivable as it does not allege non-observance of the terms of the complainant's appointment or of the ESO's rules and regulations. It also contends that the Settlement solved the conflict between the three parties concerning the issue of the incapacity pension.

11. The complainant argues that if the Observatory cannot reach an agreement with Van Breda to provide insurance for him, then the ESO would have to substitute itself for Van Breda and comply with all the obligations which would have been those of Van Breda. He claims for himself and his family, health insurance coverage which is continuous and free of premiums during the period for which he is awarded a disability pension and upon reaching the age of retirement, health insurance coverage under the same conditions as other retired staff members. He also claims damages and costs.

12. In the first place, the Tribunal considers that since the Settlement between the complainant, the ESO and the CERN Pension Fund arises out of the complainant's rights under his contract of employment as well as the Staff Rules and Regulations, it has jurisdiction to consider the effect of the trilateral agreement.

13. As the Tribunal has stated on other occasions, the settlement of disputes is to be encouraged and supported. This means that the parties themselves decide the conditions under which they are willing to put an end to their differences. The settlement reached in this case, which did not involve Van Breda, secured payment of a total incapacity pension to the complainant. In order to achieve this result the ESO agreed, with effect from 1 May 1998, to replace the reason of termination of the complainant's contract by a dismissal owing to disability. The CERN Pension Fund agreed to pay the complainant a total incapacity pension as from 1 December 1999. The Observatory also agreed, within three months from 1 May 2000, to take "the necessary measures to allow [the complainant] to be insured with the ESO health insurance company, van BREDA".

14. The complainant is thus considered as having been dismissed because he was disabled and he receives a pension on that basis. According to the terms of Article 3 B 3 of Addendum 1 to the Group Insurance Contract, persons receiving a permanent disability pension benefit from a waiver of premiums. The terms of the Settlement have certain consequences: one of which is that the complainant, who is in no way responsible for any delay there may have been in reaching that Settlement, is entitled to benefit from the provisions of the Group Insurance Contract and its Addendum that are relevant to permanent disability. If the insurer, who is not a party to the Settlement, requires payment of a premium to achieve that result, then such payment is a "necessary measure" for obtaining health insurance cover which must be fulfilled by the Observatory. The Tribunal will so order.

DECISION

For the above reasons,

1. The complaint is allowed and the ESO is ordered to take the necessary measures, including payment of premium, to obtain health insurance coverage for the complainant.
2. The complainant is entitled to costs in the amount of 4,000 euros.
3. The other claims are dismissed.

DISSENTING OPINION BY JUSTICE CARROLL

1. I regret that I cannot agree with the view of my colleagues in this matter.
2. Where a settlement of a dispute is agreed upon, it is up to the parties concerned to define with sufficient detail the terms of the settlement. The Tribunal cannot step in to supply any missing provisions.
3. Van Breda was not a party to the Settlement in question. The Settlement does not mention what would happen if Van Breda refused to insure the complainant; there was equally no mention of the payment or the non-payment of

a premium. What the Observatory agreed to do was to take the necessary measures "to allow" the complainant "to be insured" with Van Breda.

4. The Observatory did not agree "to insure" the complainant, which would imply a direct responsibility, but used the passive form "to allow ... to be insured". It would have been simple to provide a term agreeing to insure the complainant at no cost to him if that was what was intended.

5. Where, in an agreement, the parties omit terms which, if they had adverted to the situation at the time, they would certainly have inserted to complete the contract, then a case can be made for implying that such terms are necessary to achieve that result. This does not mean that a term should be implied merely because it would be reasonable to do so or because it would make the performance of the contract more convenient. The test is necessity, not reasonableness. It is not for the Tribunal to consider it reasonable that the Observatory should pay the premium.

6. In my view it cannot be stated that the Observatory would certainly have agreed, if its attention had been drawn to it at the time, to pay the entire premium if Van Breda demanded it. On 1 July 1999 the ESO had offered continued health insurance at the complainant's own expense, which he refused. Why would the Observatory have taken on an unquantified liability with regard to insurance premiums without a specific provision to that effect? The purpose of the Settlement, as stated in the preamble, was to solve the issue of the payment of an incapacity pension. The terms "to allow" the complainant "to be insured" appear to be very much an addendum.

7. It may well be that the parties assumed no premium would be payable. But whatever the explanation, the Observatory took such steps as were necessary to allow the complainant to be insured. The fact that Van Breda required a premium which the Observatory had not agreed to pay, meant that an eventuality happened which was not provided for in the contract.

8. In my opinion the Observatory fulfilled its part of the bargain.

In witness of this judgment, adopted on 9 November 2001, 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 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet