

**THIRTY-SEVENTH ORDINARY SESSION**

***In re* DE BUCK**

**Judgment No. 279**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Southern Observatory (ESO) drawn up by Mr. Frank Viktor De Buck on 8 August 1975 and brought into conformity with the Rules of Court on 4 September 1975, the ESO's reply of 25 December 1975, the complainant's rejoinder of 27 January 1976 and the ESO's surrejoinder of 16 March 1976;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, the Combined ESO Staff Rules and Staff Regulations of 1 July 1971, particularly Staff Rules SII 5.03 and SVI 1.01 and the Combined Staff Rules and Staff Regulations of 1 July 1974, particularly Staff Rule RII 6.03;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant was employed by the European Southern Observatory at grade 3 on a fixed-term contract from 15 November 1971 to 14 November 1973. On the expiry of this initial appointment he was offered another one from 15 November 1973 to 31 May 1974. According to the covering letter his appointment would not be extended beyond the date of expiry of the contract. By letter of 26 March 1974, however, the ESO offered him an extension of appointment from 1 June to 31 July 1974. Lastly, he was offered a further extension from 1 to 31 August 1974. He accepted and signed the later appointments, as he had the initial one.

B. by letter of 10 May 1974 the complainant told the ESO that in fact he had not accepted the extensions since 14 November 1973, the date of expiry of his initial appointment, and he referred to article SII 5.03 of the Staff Rules then in force, which prescribed six months' notice of non-renewal of an appointment from the second year of service.

C. The complainant contends in his original memorandum and rejoinder - and the ESO denies - that when he signed the original contract he was told that, unless a staff member was notified of the non-renewal of his contract in accordance with article SII 5.03 of the Staff rules, his contract would be automatically extended for a further two years and would become permanent after six years. In his claims for relief the complainant asks the Tribunal, in view of the ESO's failure to apply article SII 5.03, to order it to pay him 42,660 DM, the sum to which he would have been entitled had he been granted a further two-year contract, as would have been normal.

D. In its observations the ESO notes that the complainant takes 15 August 1973 as the date of the decision he impugns. That is the date of the letter offering him an extension of contract from 15 November 1973 to 31 May 1974. The ESO points out that he allowed two years to pass after the date of the impugned decision before filing his complaint and so failed to respect the ninety-day time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal: the complaint is therefore time-barred. He has also failed to exhaust the internal means of redress: his letter of 10 May 1974 (see paragraph B above) did not ask for referral of his appeal to the Joint Advisory Appeals Board, and it was in any case time-barred, over thirty days having elapsed since the date of the impugned decision. The ESO accordingly maintains that the complaint is irreceivable also under Article VII, paragraph 1, of the Statute of the Tribunal.

E. As to the merits the ESO notes the complainant's argument, based on Staff Rule SII 5.03, that he should have had six months' notice, i.e. by 15 May 1973, of non-renewal of his two-year contract which expired on 14 November 1973, whereas he was not offered a new appointment until 15 August 1973. In the ESO's view he is mistaken in inferring from its failure to give such notice a right to renewal of his contract from 15 November 1973

to 14 November 1975. It offered him a further contract by letter of 15 August 1973, i.e. three months before the expiry of his current contract. According to the principle whereby his contract with the ESO was in any case to end automatically on 14 November 1973 the complainant was fully entitled to decline the offer of extension on the grounds that he had had less than six months' notice of extension. But the complainant formally acquiesced in a series of contracts following the expiry of his original contract on 14 November 1973 and continued to perform his duties without protest. In other words, his behaviour denoted acceptance and he is estopped from resiling therefrom.

F. The ESO concludes: "The complainant is two years late in impugning the decision of 15 August 1973 and also failed to exhaust the internal means of redress provided in the Staff Rules. His complaint is therefore irreceivable. His arguments on the merits are irrelevant inasmuch as he was not entitled to extension of the contract which expired on 14 November 1973 and raised no objection despite the allegedly 'short notice' of the successive extensions of his contract. He decided to lodge a complaint only when his contract was about to expire and his 'ex post facto' arguments are plainly without merit." The ESO asks the Tribunal: as to the form: (1) to declare itself competent to hear the complaint; (2) to declare the complaint irreceivable; subsidiarily: as to the merits: to dismiss the complainant's claims for relief in their entirety as quite unfounded; further subsidiarily: to allow the defendant organisation to resort to all legal means, including the calling of witnesses to rebut the complainant's allegations and establish its own case; and at all events to award costs against the complainant, including a fair contribution to its legal fees.

#### CONSIDERATIONS:

As to the time limit for filing the complaint:

1. Article VII, paragraph 2, of the Statute of the Tribunal provides that to be receivable a complaint must have been filed within ninety days after the date of notification of the decision impugned. According to paragraph 3 of the same article, where the complainant alleges failure to take a decision, or an implied decision to dismiss his appeal, the period of ninety days shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration.

The complainant asks that a decision of 15 August 1973 be quashed. In any event the date of the impugned decision is no later than 31 August 1974, the date on which he left the Organisation, Hence, even if there is an implied decision to dismiss his appeal, the time limit for filing the complaint - 150 days in all - had expired several months before 8 August 1975, the date on which the complainant posted his complaint. The complaint is therefore time-barred and irreceivable.

As to whether the internal means of redress have been exhausted:

2. Article VII, paragraph 1, of the Statute of the Tribunal provides that a complaint shall not be receivable unless the internal means of redress have been exhausted. The right to submit a claim to an advisory body is regarded as an internal means of redress.

Under articles SVI 1.01 and following of the Staff Rules in force up to 30 June 1974, any decision taken by the Administration and challenged by a staff member had to be referred within thirty days to the Joint Advisory Appeals Board for a prior opinion. Articles RVI 1.01 and following of the Staff Rules now in force reproduce that provision. The complainant did not at any time appeal to that board and thereby failed to have recourse to internal means of redress at his disposal. Hence, even if the complaint were not irreceivable as being time-barred, it would be irreceivable on the grounds of failure to use an internal means of redress.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 4 October 1976.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

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