

## EIGHTY-SECOND SESSION

### *In re Swinnen*

#### Judgment 1577

The Administrative Tribunal,

Considering the complaint filed by Mr. Eric Swinnen against the European Southern Observatory (ESO) on 14 December 1995 and corrected on 21 December 1995, the ESO's reply of 10 April 1996, the complainant's rejoinder of 26 June and the Organisation's surrejoinder of 2 August 1996;

Considering Article II, paragraph 5, 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. On 1 April 1993 the ESO recruited the complainant, a Belgian born in 1944, on a three-year appointment. It assigned him to its astronomic observatory at La Silla, in Chile, where he held a post as a senior technical engineer. He served as deputy to the head of the Maintenance and Construction Department (M & C), at step 3 in grade 9. His performance proved satisfactory. In a confidential report of 29 August 1995 the head of M & C proposed giving him a three-year extension. Although -- said the report -- it was still unclear what post he would get since La Silla was in the throes of reform, he could take over M & C when the head left; in the meantime he had said he would accept a less senior job as leader of the Utilities Team.

The Director of La Silla is also head of the Technical and Scientific Support Department, which is known as TRS. In a memorandum of 31 August 1995 to the head of the Personnel Department he objected to extending the complainant's appointment on the grounds that M & C was to be disbanded in the course of the reforms and that to head the Utilities Team the Observatory wanted a local recruit with a background in electrical engineering.

On 4 September the complainant sent his supervisor a blueprint for reform of M & C, and it included setting up an electrical engineering group which he himself would lead. His supervisor agreed to that proposal on 7 September. But the final schedule of reform that the Director approved on 13 September put him on the list of redundant staff.

By a letter of 7 September the head of Personnel told him on the Director General's behalf that because M & C was to go his appointment would not be renewed. He appealed to the Director General on 23 October. In a letter of 30 October 1995 the acting head of Administration told him on the Director General's behalf that according to Article VI 1.02 of the Combined Staff Rules no appeal lay against non-renewal. That is the decision he is challenging.

B. The complainant submits that the impugned decision is contrary to the ESO's interests. The real reason for it is, he says, that the Director of La Silla did not want to see him at the head of M & C and so tried to get rid of him. He contends that on recruitment the ESO promised him that job if his performance was up to scratch.

Offering him no alternative post was in breach of Article R II 6.11 of the Staff Regulations, which is about the reassignment of staff whose posts have been abolished.

He pleads two procedural flaws: the head of Personnel's decision was *ultra vires*, and he was not allowed to see the Director General.

He asks the Tribunal to set the decision aside and award him damages equivalent to three years' salary and allowances. He seeks moral damages and costs.

C. In its reply the ESO denies having promised to renew his appointment or make him head of M & C. The non-renewal was the direct outcome of the retrenchment of staff that the reforms required. The Observatory was

financially better off having a local recruit in charge of the Utilities Team, since renamed the Infrastructure Support Group.

The defendant submits that the complainant may not rely on Article R II 6.11, which applies only to termination, not to expiry of appointment. It did try to place him but there were no non-local posts to match his qualifications and background.

There was no breach of due process. It is plain from the head of Personnel's letter of 7 September 1995 that it was simply conveying the Director General's decision not to renew the contract. Besides, the Director General was under no duty to give the complainant a hearing before taking the decision and already knew the complainant's views anyway from the text of his blueprint for reform.

D. The complainant rejoins that the Director General was unaware of his views. The proposals mooted on 26 August 1995 when the Director General was at La Silla put him in charge of the electrical engineering group. The final schedule put him on the list of redundant staff and ran counter to what had been decided. So the Director General could not have known the reasons for getting rid of him and the Director of La Silla decided on his own against renewal. The reason why the complainant was not put in charge of the Infrastructure Support Group was that he was overqualified and the man who got the job, a civil engineer, is not qualified for it. The ESO acted in bad faith by letting him believe until 7 September 1995 that he would get renewal.

E. In its surrejoinder the ESO submits that in the talks with the Director General on 26 August 1995 about reform not a word was uttered that might have led the complainant to expect to be heading the new Electrical Engineering Group. Indeed the head of M & C said in his report of 29 August that it was still unclear which post he might get. The complainant's own blueprint of 4 September made new suggestions and did not reflect the talks of 26 August. Though the head of M & C was in favour of renewal the Director of La Silla and the Director General were not. The leader of the new Electrical Engineering Group was chosen after reassessment of the duties of the post and of the qualifications of other members of the group. He is the man best qualified for the job.

## CONSIDERATIONS

1. The ESO employed the complainant under a three-year appointment as a senior technical engineer and deputy to the head of the Maintenance and Construction Department (M & C) at its astronomic observatory at La Silla. By a letter dated 7 September 1995, which he received on 15 September, the head of the Personnel Department gave him notice that the ESO would not be renewing his appointment after 31 March 1996, the date of expiry. Since under Article VI 1.02 of the Combined Staff Rules internal appeal does not lie against such a decision, he has come straight to the Tribunal. He seeks the quashing of the decision, payment of the equivalent of three years' salary and allowances and awards of moral damages and costs.

2. He submits that the decision of 7 September 1995 is unlawful on both procedural and substantive grounds. His procedural pleas are that the decision was taken *ultra vires* and in breach of his right to a hearing. On the merits he argues that in the absence of any criticism of his performance the non-renewal was calculated to serve the interests, not of the Observatory, but of an overweening head of department. In any event the ESO had a duty under the Staff Regulations to look for another post for him before ending his appointment, and its failure to do so offended against Article R II 6.11 and the Tribunal's rulings about non-renewal upon abolition of post.

3. His first plea is that the head of Personnel had no authority to take the challenged decision: it is the Director General that Article R II 6.03 of the Regulations empowers to decide whether or not to extend a fixed-term appointment. The plea fails. Though signed by the head of Personnel, the letter of 7 September 1995 gave him notice "on the Director General's behalf". So this case is not on all fours with the one ruled on in Judgment 1185 (*in re Mermier*). There the Tribunal set aside as *ultra vires* a decision signed by the Leader of the Division of Personnel of the European Organization for Nuclear Research (CERN), there being no mention of delegation of authority to him by the Director-General: the Tribunal could not tell on the evidence who had taken the decision. Here the wording of the decision leaves no doubt but that the head of Personnel was merely conveying a decision of the Director General's.

4. The complainant's second plea is breach of due process in that he had not been given his say beforehand. It too is unsound. By giving him notice over six months before the expiry of his appointment the ESO met its obligations under Article R II 6.03 of the Regulations. No other rule or general principle required giving the holder of a fixed-

term appointment a hearing before deciding not to extend it. In the complainant's submission he was in good faith entitled to look forward to extension, having taken part in August and early September 1995 in the talks on reform of M & C. But there is no official document before the Tribunal to suggest that he was misled over the Observatory's intentions despite his supervisor's recommending an extension, even on a more junior post.

5. Actually it is his supervisor's favourable opinion of him that has prompted his plea that the reasons for the decision had nothing to do with his record of service or the Observatory's interests. True, the head of the department of which he was deputy head and the Director at La Silla were at odds about how the reforms of the technical units would affect him. In a report of 29 August 1995 the former recommended extension, though the post he was to have eventually was still unclear. But the Director made it quite plain in his memorandum of 31 August 1995 that since M & C had to go so must the posts of head and deputy head and the complainant's appointment therefore could not be extended.

6. Setting up a very large telescope (VLT) some five hundred miles away meant less work and fewer staff for the site at La Silla. Among other things, it meant the end of M & C. There is no evidence to suggest that the reform was contrary to the ESO's interests; in fact it served them. The Director of La Silla did obviously have a hand in the decisions to take the complainant off a post that was doomed anyway and to put a locally recruited civil engineer in charge of the Infrastructure Support Group, a job that the complainant would have taken. Yet there is no evidence of misuse of authority.

7. The complainant's last plea turns on the ESO's failure to offer him another post after abolishing the one he held. That, he argues, offended against Article R II 6.11 of the Staff Regulations. But what the provision says is that the Director General may not terminate an appointment before trying to find the staff member some other post: it has no bearing on a decision not to extend a fixed-term appointment beyond the scheduled date of expiry. At all events the Observatory maintains, and the complainant fails to disprove, that it had no suitable vacancy for a non-local official with his qualifications and experience.

8. Since bad faith may not be imputed to the defendant, the complainant's claim to the quashing of the impugned decision cannot succeed. His claims to damages and costs must therefore fail as well.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

William Douglas  
Michel Gentot  
E. Razafindralambo  
A.B. Gardner