

EIGHTY-SECOND SESSION

In re da Costa Campos

Judgment 1586

The Administrative Tribunal,

Considering the complaint filed by Mr. Arthur George da Costa Campos against the European Southern Observatory (ESO) on 15 December 1995 and corrected on 13 February 1996, the ESO's reply of 5 June, the complainant's rejoinder of 31 July and the Organisation's surrejoinder of 11 October 1996;

Considering Articles II, paragraph 5, and VIII 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 ESO recruited the complainant, a Belgian who was born in 1943, in 1974 on a three-year appointment as a personnel officer at step 5 in grade 8. After two extensions it granted him an indefinite appointment on 15 June 1981. On 19 January 1982 it gave him an award for outstanding service. On 23 November 1988 it promoted him to step 10 in grade 9, as head of Personnel Administration and General Services as from 1 March 1988. He got a second award for outstanding service on 20 December 1989. The Director General promoted him to step 4 in grade 10 on 17 December 1992.

The post of head of Personnel was vacant from the end of July 1980 to August 1993, except from January 1985 to April 1986. In March 1993 the complainant applied for it but the ESO said that he was not qualified.

By a letter of 1 December 1994 the Director General told him that he was dismissed under Article R II 6.01 i) of the Staff Regulations, which allowed dismissal "for other specified reasons, related to the exercise of functions". The letter said that though his appointment was to expire at 1 July 1995 he would stop work on 2 December 1994, the date of notice of dismissal. He would be on special paid leave during the period of notice and was to remove all his belongings from his office by five o'clock on that day. The reasons given were that for over a year he had been failing to carry out his main tasks properly, had got on badly with his first-level supervisor, the head of Personnel, and by his behaviour had marred the Organisation's standing and good name.

On 10 January 1995 he told the Director General that he was appealing against the decision. By a memorandum of 20 February the head of Administration passed on his appeal to the Joint Advisory Appeals Board on the Director General's behalf. In its report of 18 May the Board held that the ESO had failed to show good cause for the dismissal. It recommended reinstatement in the Personnel Department.

The outcome of the talks that ensued was that the ESO made him an offer of a termination indemnity equivalent to almost 58 months' pay, but the complainant turned it down.

In a letter of 19 September 1995, the impugned decision, the Director General upheld his decision of 1 December 1994.

B. The complainant alleges breach of due process in that he was not allowed his say before dismissal.

He answers the criticisms of his performance and conduct and submits that the ESO drew clearly wrong conclusions from the evidence.

It was, he says, in breach of good faith: it tried, after the event, to trump up a case and concocted serious and gratuitous accusations against him.

It was in breach of its duty not to cause its staff unnecessary or undue injury and to respect their dignity and good name. In support of this allegation he cites the circumstances of dismissal, the Director General's harsh words about him on the very day he was told of it and the ESO's almost insulting submissions to the Appeals Board.

He pleads abuse of process and misuse of authority and submits that he has sustained serious material and moral injury.

He asks the Tribunal to quash the impugned decision, order his reinstatement as from the date of termination or, failing that, award him damages for loss of earnings and pension. He seeks moral damages and costs.

C. In its reply the ESO explains why it decided not to keep the complainant on. Since failing in August 1993 in his application for the post of head of Personnel he had been prickly about anything he saw as a slight on his ability; he had ideas of his own about staff management and did not take kindly to applying the Observatory's policy under orders from the head of Personnel, whom he made out in his internal appeal to be a bungler. Keeping him on would have hampered the Personnel Department's main work. The ESO's interests must prevail over his and for that reason, in its submission, the impugned decision must stand.

The ESO contends that the indemnity it offered him was fair redress. Article R A 11.01 i), 2) of the Regulations empowers the Director General, where someone is dismissed "for other specified reasons related to the exercise of functions", to grant at discretion an indemnity not to exceed the amount due where a post is abolished.

D. In his rejoinder the complainant points out that a decision is to be set aside, not because an organisation's interests so require, but because it is unlawful. By failing to answer the complainant's legal arguments the ESO concedes the unlawfulness of the impugned decision. What is more, it has "paid no heed to the Appeals Board's conclusion that the original decision to terminate showed procedural and substantive flaws". There was nothing fair about its final offer of compensation: he would have got no more had the termination been lawful. The offer covers neither the loss of pay and pension nor the serious moral injury.

E. In its surrejoinder the ESO maintains that reinstatement would be contrary to its interests and its offer of compensation was quite fair. In its submission there is ample redress for any moral injury in letting the complainant have several years' pay without requiring him to work for it.

CONSIDERATIONS

1. The complainant joined the ESO on 8 July 1974 as a personnel officer at step 5 in grade 8. He had his contract renewed several times and on 15 June 1981 got a permanent appointment. He was promoted on 23 November 1988 to head of Personnel Administration and General Services at step 10 in grade 9 and on 17 December 1992 to step 4 in grade 10 on the same post. He had his second promotion confirmed on 10 February 1993 by a new Director General. He applied for the vacant post of head of Personnel but in August 1993 the ESO appointed someone else. In October 1994 it also appointed a new head of Administration. In planning administrative reforms it came to the view that for the sake of efficiency the complainant would have to go.

In a letter of 1 December 1994 the Director General cited Article R II 6.01 i) of the Staff Regulations and told him that he must clear out the very next day, 2 December, though his appointment would not end until 1 July 1995.

The complainant gave notice of appeal and the Director General put his case to the Joint Advisory Appeals Board. In their fully reasoned report of 18 May 1995 the Board were of one mind that the ESO had failed to show just cause for the termination; for want of a settlement by payment of a termination indemnity they recommended reinstating him.

The talks that the parties then started came to naught. On 19 September 1995 the Director General rejected the appeal on the grounds that the complainant's attitude and character made his presence useless; for one thing he had been critical of the head of Personnel; so it was in the ESO's interests that he should leave.

2. That is the decision the complainant is impugning. His claims are to the quashing of the decision, and to reinstatement or, failing that, an award of material damages, and to moral damages and costs. His pleas are that:

(1) he was given no prior hearing;

- (2) clearly wrong conclusions were drawn from the evidence;
- (3) there was breach of good faith;
- (4) he sustained serious undue injury;
- (5) the ESO failed in its duty of respect for the dignity and reputation of a staff member;
- (6) there were breach of due process and misuse of authority.

The Organisation asks the Tribunal to dismiss the complaint. It does not challenge the Appeals Board's views. It admits to having had no legal grounds for dismissal but contends that the complainant's personality bars taking him back; so the only answer, and one allowed by Article VIII of the Tribunal's Statute, would be to award him damages for wrongful dismissal. It maintains the offer which it made him in the talks: though he turned it down, it went as far as the rules empowered the Director General to go.

3. So it is common ground, and indeed beyond dispute, that the termination was unlawful and cannot stand.

All that need indeed be said on that score is that the termination was decided in breach of his right to a hearing: for dismissal, see Judgment 1484 (*in re* Thuillier) under 8 and the precedents cited therein and, for changes in a staff member's status, see Judgment 1496 (*in re* Güsten) under 9 and 11 and the rulings cited. But the Tribunal may go into the merits too, since they are in no way to the detriment of the complainant's case. If the ESO wanted to get rid of him on the grounds of his shortcomings -- though they were not especially serious anyway -- it had a duty to warn him in what ways he fell short and give him the opportunity of doing better: see Judgment 1546 (*in re* Randriamanantenasoa) under 18 and the case law cited therein. The ESO failed to do so. Moreover, had his shortcomings warranted disciplinary action, he should have had the safeguards of disciplinary proceedings. It is wrong to deprive someone of those safeguards by resorting to some other procedure for termination that allows no right of defence: see Judgment 1496 under 8.

Lastly, the summary dismissal and the way in which the complainant had notice of it were quite irrelevant to the ESO's interests and were damaging to his dignity and good name: see again Judgment 1496 under 9 and 13 and the case law cited therein.

4. The termination being wrongful, what are the consequences for the complainant's appointment, and what damages is he to be awarded?

Under Article VIII of its Statute the Tribunal, "if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon"; but if such rescinding or performance is "not possible or advisable" the Tribunal will award the complainant compensation for the injury sustained.

Being unlawful on more than one count, the decision impugned in this case must be set aside.

The circumstances of each case determine whether redress is to take the form of reinstatement or an award of damages. Here, though the complainant must be made whole, that may be done by an award. It is doubtful whether it would be reasonable to order the ESO to take back someone who got on badly with other senior officers, especially when there may be little scope for finding him proper employment in an organisation of that size. Besides, in the talks the complainant did not rule out a financial settlement, even though there was no agreement on the amount.

The parties agreed that if the ESO had abolished the complainant's post it might under the material rules have awarded him the equivalent of 57 months' basic pay in all: 46 months' basic pay plus repatriation grants and pay for the period of six months' notice. The ESO offered to round the amount up to 58 months' pay. But instead of abolishing his post it wrongfully dismissed him. Taking account of his age and career prospects, the Tribunal holds that he will get fair redress in the award of the equivalent of 50 months' basic pay, plus repatriation grants and pay for the six months' notice, or a total of 61 months' basic pay. That amount covers the loss of all the entitlements of employment, including pay, pension, medical insurance and annual leave. Any sums already paid by the Observatory are to be subtracted from the total.

5. The ESO may choose between reinstatement and the award of such damages. Whichever option it may prefer, the complainant is further entitled, by way of compensation for the injury attributable to the sudden breach of contract, to an award of 50,000 French francs in moral damages. Since the complaint is allowed the Observatory shall also pay him costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Observatory shall decide whether to reinstate the complainant.
3. If it does so, it shall reinstate him as from the date of the termination of his appointment.
4. If it does not, it shall pay him damages in the amount of 61 months' basic pay less any amounts already made over to him.
5. It shall pay him 50,000 French francs in moral damages.
6. It shall pay him 20,000 francs in costs.

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

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner