

## EIGHTY-FOURTH SESSION

### *In re Palma*

#### Judgment 1718

The Administrative Tribunal,

Considering the complaint filed by Mr. Francesco Palma against the European Southern Observatory (ESO) on 10 December 1996 and corrected on 13 January 1997, the ESO's reply of 17 April, the complainant's rejoinder of 30 July and the Observatory's surrejoinder of 20 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts which prompted this complaint are set out under A in Judgment 1665, on Mr. Palma's complaint against the European Organization for Nuclear Research (CERN). Like other ESO staff, he is a participant in the Pension Fund of that Organization.

By two letters of 6 August 1996 the complainant asked the Director General of the ESO to confirm that decisions refusing him a post and medical coverage were final. The head of Personnel told him in a letter of 22 August that the insurance brokers, Van Breda, had agreed to continue his medical coverage as from 1 September 1995; since he was receiving from the CERN Pension Fund *ex gratia* benefits equivalent to 40 per cent of an "incapacity pension", he would have to pay only 60 per cent of the normal premium for the category of staff to which he had belonged while in the Observatory's employ. The complainant rejected that offer in a letter of 31 August 1996.

By a letter of 15 September he asked the Director General to answer his request of 6 August within sixty days. The head of Personnel repeated his offer on 20 September. On the same day the head of Administration replied on the Director General's behalf to the complainant's letter of 15 September and pointed out to him that the Director General had approved the Rehabilitation Board's recommendation for payment of an "unsuitability pension"; the CERN Pension Fund's decision of 7 May 1996 to grant him *ex gratia* benefits equal to "a partial incapacity pension of 40%" had been the outcome of an appeal he had lodged with the Fund and was not binding on the ESO.

By a letter of 9 October 1996 the complainant asked the Director General "to newly express" his decisions. He got no reply. In the complaint form he says that he is impugning the implied rejection of what he asked for in his letters of 6 August 1996.

B. The complainant submits that his disability, which he says CERN and the ESO have acknowledged, was due to an accident he suffered while working for the ESO and that he must be "assigned to duties corresponding to his physical capacities": that, he says, is what Article R II 1.27 of the Staff Regulations requires. In his submission, the Director General had no right to end his appointment before summoning the Rehabilitation Board and granting him an incapacity pension. The ESO got rid of him "inhumanely", leaving him with no health insurance and no job prospects.

He demands from the Director General express confirmation of the decisions refusing him rehabilitation so that he will have written evidence of the breach of his rights. Such written decisions would help him, if need be, in claiming national or international entitlements.

He asks that the Tribunal "compels" the Director General "to clearly and unambiguously state his *legally* presumed negative final decisions", particularly on assignment to a post and on health insurance. He seeks costs.

C. The Organisation replies that the complaint is irreceivable. For one thing, what the complainant wants is

neither the "rescinding" of a decision nor the "performance" of an obligation -- to quote Article VIII of the Tribunal's Statute -- but a statement of decisions, apparently to afford grounds for some complaint yet to come. For another thing, even if his complaint were taken to be challenging the Organisation's implied refusals of a post and of full health insurance, it would be irreceivable for two reasons: it is out of time and some of his claims were dismissed in Judgment 1665.

The Organisation's pleas on the merits are subsidiary. It submits that it is under no duty to reappoint the complainant or to grant him health insurance. It did not dismiss him for invalidity: it was unaware of his ailments when it decided not to renew his appointment. Article R II 1.27 does require it to give someone with a disability duties corresponding to his physical capacities, but does not apply when the appointment has ended for other reasons. Nor may the complainant claim health insurance, having left the staff. After the CERN Pension Fund had granted him *ex gratia* benefits equal to a partial incapacity pension of 40 per cent it offered him retroactive health insurance with a proportional cut in premiums. Its offer still stands.

D. The complainant rejoins that his complaint is receivable: what he was objecting to was non-observance of provisions of the Staff Rules and Regulations, and he did so in time. In this complaint he is not claiming a post at the ESO or health insurance but is "creating the legal basis for possible ... complaints" to be put later to the Tribunal or to other bodies. The state of his health is, he says, "dramatic" and his incapacity, though assessed at 40 per cent, is in fact total since no one else will employ him.

He adduces items of evidence in rebuttal of the Organisation's contentions that he left the ESO on the expiry of his fixed-term appointment; that he did not appeal against the termination; that at the time the ESO did not know of his disability; that there were proper proceedings before the Rehabilitation Board; and that he appealed too late against the decisions on rehabilitation and on health insurance.

Lastly, he asks the Tribunal, should it find the factual evidence inadequate, to hear the Director General and ten other witnesses.

E. In its surrejoinder the Organisation points out that in Judgment 1665 the Tribunal held that the complainant had not appealed against the decision not to renew his appointment. Since his sole purpose is to reopen the case his complaint is irreceivable. The ESO rebuts his other pleas and presses its claims.

## CONSIDERATIONS

1. The complainant is challenging the implied rejection of two requests which he made in two letters he wrote to the Director General on 6 August 1996. In one letter he asked the Director General to confirm that "ESO decision of not granting Mr. Francesco Palma any post and any re-assignment at ESO as handicapped is final". In the second letter he asked the Director General to confirm that "ESO decision of not granting Mr. Francesco Palma a health insurance coverage after handicapped at ESO, as one of the rehabilitation measures is final".

2. The relief he seeks is that the Tribunal "compels" the Director General "to clearly and unambiguously state his *legally* presumed negative final decisions in conformity to ESO Staff Rules and Regulations R II 1.25 up to R II 1.28 and RB 4.03 par. 11 and more specifically according to the Rule R II 1.27 concerning 'assignment' in a job at ESO and an ESO full Health Insurance coverage for the 'disabled' complainant".

3. Under Article VII(1) of the Tribunal's Statute "A complaint shall not be receivable unless the decision impugned is a final decision". The complainant has misunderstood the purpose of Article VII, paragraph 3, which is about the implied rejection of a claim. Its purpose is to allow a complainant who has got no decision on his claim to act as if a final decision had been taken. If no decision is forthcoming within sixty days of the notification of the claim to the Administration, the complainant may, within a further time limit of ninety days, bring a complaint against the implied rejection, which becomes the impugned decision. The receivability and merits of the claim can then be examined. There is no provision for applying to the Tribunal for an order to the Director General to state a negative final decision.

4. In reply to the second of the complainant's letters of 6 August 1996 the head of Personnel informed him by a letter of 22 August 1996 that, although he was not entitled to the continuance of health insurance coverage with the ESO, Van Breda, the insurance brokers, were willing to grant him retroactive continuance

of coverage as from 1 September 1995; in view of the *ex gratia* grant of a 40 per cent pension he would be "exempted from the premium payment for 40%" and would have to pay "the normal premium for the category of staff" he belonged to "at a rate of 60%"; but coverage would not be valid for any period since 1 September 1995 in which he had benefited from other insurance schemes.

5. In a letter of 31 August 1996 to the head of Personnel the complainant turned down that offer and reiterated his demand for confirmation of the two negative decisions.

6. The head of Personnel wrote again on 20 September 1996 to remind him that his case had been submitted to the ESO's Rehabilitation Board and that the Director General had approved its recommendation for paying him an "unsuitability pension".

7. The head of Administration wrote to him on the same day making the same observations and saying that he had been granted the unsuitability pension as from 1 September 1995. He added that the subsequent decision of the Pension Fund of the European Organization for Nuclear Research (CERN) -- in which he was a participant -- to grant him *ex gratia* benefits equal to a partial incapacity pension of 40 per cent as from the same date was a decision taken on his appeal to that Fund and did not involve the Observatory.

8. The complainant has pressed his claim to relief which the Tribunal is not competent to grant.

### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll  
Mark fernando  
James K. Hugessen

A.B. Gardner