

## **EIGHTY-FIFTH SESSION**

### ***In re* Ansorge**

#### **Judgment 1739**

The Administrative Tribunal,

Considering the complaint filed by Mr. Wolfgang Ansorge against the European Southern Observatory (ESO) on 22 April 1997 and corrected on 21 July, the ESO's reply of 28 October 1997, the complainant's rejoinder of 3 February 1998 and the Observatory's surrejoinder of 17 March 1998;

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. The complainant, a German who was born in 1941, joined the ESO on 1 May 1991 under a fixed-term appointment for three years. It assigned him as "product assurance manager" to its Very Large Telescope (VLT) project in Chile. On 19 November 1993 it renewed his appointment for three years, until 30 April 1997.

By a memorandum of 2 February 1995 the head of Administration informed the staff that over and above his other duties the complainant would be in charge of safety and security.

On 24 and 25 September 1996 the Contract Advisory Committee met to discuss the award of indefinite appointments. For the complainant it recommended only a two-year extension, to 30 April 1999. In a letter of 30 October 1996 the head of Personnel offered him such extension on the Director General's behalf, explaining that the project would thereafter not need any "product assurance manager". In a letter of 21 November the head of Personnel confirmed that offer and told him that the matter of his duties as safety manager would be considered later. On 16 January 1997 the complainant signed the offer of extension with the rider "without prejudice to my rights".

On the same day he filed notice of appeal against the refusal of an indefinite appointment: he asked the Director General to reverse the decision or else let him go straight to the Tribunal. By a letter of 23 January 1997, the impugned decision, the head of Administration told him that the Director General agreed to waive the internal appeal procedure.

By a memorandum of 3 April 1997 the Director General informed the staff that he was relieved of duty as safety manager and would be replaced temporarily by the head of Administration. In a letter of 23 April 1997 to the complainant the head of Personnel confirmed that decision.

B. The complainant has four pleas.

The first is that the impugned decision is unlawful because it shows a procedural flaw. Before deciding whether to grant an indefinite appointment the Director General has to consult the Contract Advisory Committee, which should apply objective criteria. On this occasion the Committee already had the Director General's decision on every single case; so how could it act properly as an advisory body?

Secondly, the decision is in breach of the rule, stated time and again in the case law, that there must be a valid reason for any decision and that the reason must be given to the staff member. According to the Committee's finding and to a statement in an official ESO document, the VLT project has more than two years to run and will need a product assurance manager beyond the date of expiry of his contract. The reason given for the decision is wrong. Besides, the Observatory has ignored his duties as safety manager, which, as the organisation chart for 1997

bears out, are indefinite.

Thirdly, the decision is an abuse of authority. The ESO will not save money by keeping him on for only two years, since it will need a product assurance manager of his experience and competence until the VLT project is over. What has the nature of his post got to do with the length of his appointment anyway? Some holders of fixed-term appointments are in permanent posts. The only possible explanation is that the ESO wants to "get rid of him". He mentions several rows he had with his supervisor about breaches of safety standards and the shortcomings of an Italian subcontractor. That the supervisor is himself Italian may account for his giving "unqualified support" to that firm to the detriment of the ESO's interests. It was after a disagreement with the Administration at a meeting on 21 January 1997 that the Director General relieved him of his duties as safety manager. The ESO could have given him a permanent appointment on the strength of those duties, which are of indefinite duration.

Lastly, precedent lays on an organisation the duty not to cause an employee any undue and unnecessary injury. By refusing an indefinite appointment the ESO failed in that duty.

He seeks the quashing of the Director General's decision of 23 January 1997 and full redress, viz. the grant of a permanent appointment or, failing that, a fixed-term one "up to the expiry of the ESO's VLT project", i.e. at least the end of 2006". He claims costs.

C. The ESO replies that the letter of 23 January 1997 giving the complainant leave to go directly to the Tribunal is not the final decision. The Director General took his final decision on the appointment on 21 November 1996 and he should have filed within ninety days of getting notice of it. Since he did not file until 22 April, his complaint is out of time.

On the merits the Observatory rebuts the complainant's allegations against his supervisor, which amount to charges of corruption, and his contention that it relieved him of duty as safety manager so as to "get rid of him": that decision, it says, came after the impugned decision and is quite distinct.

According to Article VI of the ESO's founding Convention the grant of a permanent appointment is at the Director General's discretion.

There was nothing wrong with the process whereby the decision was taken not to give him one. The rules require the Personnel Department to consult the staff member's supervisors before referral to the Contract Advisory Committee; the Committee then makes its recommendation, and the Director General takes his final decision.

As to the reasons for the decision, the post of product assurance manager will become redundant in early 1999, when the VLT project will be at its last phase. Because staff have to be retrenched very few will get a permanent appointment. Besides, the complainant's duties as safety manager account for only a small part of his job.

Lastly, the ESO denies abuse of authority and prejudice, pointing out that it recently gave him a pay increase.

D. In his rejoinder the complainant maintains that his supervisor broke the Observatory's safety rules and that the impugned decision is linked to the so-called "management decision" to relieve him of duty as safety manager.

He rebuts the ESO's objections to receivability. Articles VI 1.03 and VI 1.04 of the Staff Rules, which are about appeals, provide first for appeal to the Director General against the original decision then for complaint to the Tribunal against the final decision. He was barred from filing a complaint against the decision of 21 November 1996 until the Director General had waived the internal appeal procedure. So the complaint is not out of time. He presses his pleas on the merits.

E. In its surrejoinder the ESO maintains that the complaint is irreceivable. It rejects the complainant's arguments as pure conjecture and presses its other pleas.

## CONSIDERATIONS

1. The complainant joined the ESO on 1 May 1991 under a fixed-term appointment for three years which he signed on 11 April 1991 and it employed him on its Very Large Telescope (VLT) project as "product assurance manager". It renewed his appointment on 19 November 1993 for three years, until 30 April 1997. On 2 February 1995 it made him safety and security manager and put him in charge of all its safety programmes in Chile and Germany, over

and above his duties under the project."

2. On 30 October 1996 the head of Personnel offered him a two-year extension of appointment, until 30 April 1999, and on 21 November sent him another letter which was the same as the one of 30 October but for an additional paragraph about his duties as safety manager.

3. On 16 January 1997 the complainant signed the offer of the two-year extension, though he added the words "without prejudice to my rights". The same day he appealed against the refusal of a permanent appointment, asking the Director General to reverse the decision or else let him take his case directly to the Tribunal on the grounds that it raised only issues of law. On 23 January 1997 he got a letter from the head of Administration saying that the Director General gave him leave to do so.

4. On 3 April 1997 the staff were told that the head of Administration was to take over immediately from the complainant as safety manager. On 24 April the complainant wrote to the Director General to say that he had been given no reason for the decision to relieve him of duty as safety manager and that the ESO's handling of the matter had harmed his dignity and good name.

5. His main claim is to the quashing of the decision of 23 January 1997 and the award of a permanent appointment. He has a subsidiary claim to the grant of a fixed-term appointment up to at least the end of 2006.

#### *Receivability*

6. The Observatory submits that the complaint is irreceivable on the grounds that the final decision was the one of 21 November 1996 and that by not filing until 22 April 1997 the complainant failed to observe the time limit of ninety days in Article VII(2) of the Tribunal's Statute.

7. The plea is mistaken. The decision of 21 November 1996 was not the final one. As the head of Administration implied in his letter of 23 January 1997, it was indeed challengeable in an internal appeal and the complainant lodged such an appeal with the Director General, asking him either to revoke that decision or else waive the internal procedure. In his reply of 23 January 1997 the Director General gave him leave to come straight to the Tribunal, thereby impliedly rejecting his appeal against the decision of 21 November 1996. The time limit in VII(2) started at the date of notification of the Director General's reply, 23 January 1997. Since he filed his complaint on 22 April 1997, he observed the time limit of ninety days, and it is therefore receivable.

#### *The merits*

8. The complainant contends the impugned decision was unlawful because it showed a procedural flaw: the prior consultation of the Contract Advisory Committee was perfunctory and served no purpose anyway since it was told just what the Director General had already decided to do in each case.

9. The plea fails. The entry of the word "extension" against his name in the document put to the Committee did not mean that Personnel or the Director General had already taken a decision or that the Committee could not make a recommendation on the strength of its assessment of the evidence before it. And it did make its own assessment. It said in its recommendation that "a three-years contract extension could well be in conflict with the current schedule of the VLT programme, including VLT1 and VLT instrumentation ... In this context, it should be borne in mind that Mr. Ansorge would reach his age of retirement (65) in 2006, i.e. shortly after the project-orientated need for Product Assurance of VLT, VLT1 and VLT instrumentation should come to an end".

10. The complainant further objects that the ESO failed to give him, as it ought, the real reasons for the impugned decision and drew obviously wrong conclusions from the evidence.

11. The reason the defendant gave for granting only the two-year extension was that when it recruited the complainant his post had been declared non-permanent. The Committee acknowledged as much though it observed that the project would need "Product Assurance" until 2006, when the VLT, VLT1 and VLT instrumentation programmes were to end. There is nothing in the evidence to suggest that the refusal of a permanent appointment was prompted by any reasons but those stated in the decision of 21 November 1996, namely that his post was not an indefinite one and few permanent appointments were to be had anyway.

12. Lastly, the complainant contends that the decision is unlawful because it was obviously not in the ESO's

interests and so there was abuse of authority.

13. He adduces no objective evidence in support of that view.

14. Nor, in view of the foregoing, is there anything to bear out his contention that the ESO failed in its duty to avoid causing him unnecessary or undue injury.

## DECISION

For the above reasons,

The case is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

*(Signed)*

Michel Gentot  
Jean-François Egli  
Seydou Ba

A.B. Gardner