

## SIXTY-FIFTH SESSION

### *In re* MAUGIS

#### Judgment 945

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michel Maugis against the European Southern Observatory (ESO) on 3 June 1988, the ESO's reply of 11 August, the complainant's rejoinder of 2 September and the ESO's surrejoinder of 27 September 1988;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles R II 4.34 and R II 4.35 of the ESO Staff Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The first paragraph of Article R II 4.34 of the ESO Staff Regulations reads: "Home leave shall be granted to non-resident members of the personnel whose contract runs for at least two years. It shall be spent in the country of their home station"; and R II 4.35: "The first period of home leave shall be granted during the second year of service and the subsequent periods every alternate year thereafter".

The complainant, a Frenchman, joined the staff of the ESO in Chile on 1 October 1979. He took his first home leave during the second year of service and the second two years later. His third application for home leave was accepted, though made not in the sixth but in the seventh year of service; but in a minute of 30 July 1987 the Administration warned him that he would have to take his next leave by 30 September 1987. He objected, but after correspondence the decision was upheld in a letter of 6 August from the deputy head of Administration and in one of 2 September 1987 from the head of Administration, which also said that only exceptional circumstances would warrant a derogation from the rules.

On 15 September the complainant applied for permission to take home leave from 24 November 1987 to 1 February 1988. The deputy head of Administration refused in a letter of 2 October 1987. The head of Administration confirmed the refusal on 5 November and on the morrow the complainant lodged an internal appeal. By a letter of 19 April 1988, the impugned decision, the Director-General informed him that his appeal was rejected.

B. The complainant construes R II 4.35 to mean that, though only one period of home leave is due in every two-year period, the first period starts on the first day of the second year of service. The ESO is mistaken in contending that home leave may be taken only in an even-numbered year of service.

He further submits that he was entitled to home leave also because of exceptional circumstances.

He claims the quashing of the decision he impugns, 10,000 Deutschmarks to cover his own travel expenses, 10,000 United States dollars to meet the cost of a return journey Santiago/

Paris/Santiago for his family, a further 18,000 Deutschmarks corresponding to two months' salary, and moral damages in the amount of \$9,000 to be paid to a fellow staff member who was also refused home leave, and \$2,000 in costs. He also asks the Tribunal to order the ESO to adopt a new policy on home leave.

C. The ESO's reply is that only the first claim formed part of the internal appeal and the others are therefore irreceivable under Article VII(1) of the Tribunal's Statute.

As to the merits the ESO submits that it is clear from R II 4.35 that since the complainant began service on 1 October 1979 he ought to have taken home leave between 1 October 1986 and 30 September 1987. After the latter date he was not entitled to home leave until 1 October 1988. Nor were there any exceptional circumstances

warranting derogation from the rule.

The ESO submits that since the main claim is devoid of merit so are the others.

D. In his rejoinder the complainant enlarges on his pleas about the interpretation to be put on R II 4.35. He maintains that the ESO is in bad faith in pretending not to know of the exceptional circumstances that made him postpone his home leave. His dismissal was notified to him on the very same date as the decision about his home leave, and the two decisions formed part of a policy of victimisation.

E. In its surrejoinder the ESO maintains that the construction the complainant puts on R II 4.35 is at odds with both the actual wording and long-standing practice. His charges of victimisation, which the organisation categorically denies, are immaterial, the sole issue being the lawfulness of its own interpretation.

#### CONSIDERATIONS:

1. The material issue is whether at the European Southern Observatory home leave (a) has to be taken during the currency of every second year of each two-year period of service or (b) may be taken at any time during a two-year period starting at the end of the first, third and each succeeding odd-numbered year of service.

2. The ESO Staff Regulations provide in Article R II 4.34 that home leave "shall be granted to non-resident members of the personnel whose contract runs for at least two years". It is further provided in R II 4.35: "The first period of home leave shall be granted during the second year of service and the subsequent periods every alternate year thereafter".

3. The organisation submits that the rule is clear: the official is entitled to home leave during the second year of service and again during the fourth year and so on. In accordance with long-standing practice home leave that is not taken during the year of entitlement is forfeited.

4. The complainant, who joined the staff of the ESO in October 1979, took home leave during the second and fourth year of his employment. In his sixth year he did not apply for home leave. When he did so in the seventh year it was granted. On 30 July 1987 he was told, in order to avoid any misunderstanding, that he would have to take his fourth home leave before 30 September 1987, i.e. by the end of his eighth year. After discussions the decision was reiterated in letters of 6 August and 2 September 1987. He applied on 15 September for home leave from 24 November 1987 to 1 February 1988. His application was refused and after appeal proceedings the Director-General confirmed the refusal in a letter of 19 April 1988, the decision impugned. The complainant contends that the rule means that home leave may be taken not just in the year of entitlement - i.e. every second year of service - but also in the following year.

5. The first part of R II 4.35 is complete in itself: "The first period of home leave shall be granted during the second year of service ...". For the sake of brevity the words underlined have been omitted from the second part of the sentence. If they are restored the second part reads: "... and the subsequent periods of home leave shall be granted during every alternate year thereafter". It thus becomes clear that the right to home leave is confined in every case to a single year, i.e. the second, fourth and each succeeding even-numbered year of service.

6. There is no basis in law for the complainant's interpretation. It may be convenient to be able to postpone home leave, but that is no basis for his interpretation. Besides, as the organisation points out, if it were sound, two entitlements could be run together in every four-year period, one home leave being taken at the end of the third year and another at the beginning of the fourth. That is clearly contrary to the purpose of the rule, which provides for home leave every other year.

7. Since the rule is clear the complainant is not entitled to the relief he seeks, there being no need to consider the ESO's objections to the receivability of his claims.

8. Lastly, the complainant does not cite any fact that might have warranted an exception to the rules on home leave.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner

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