

The Administrative Tribunal,

Considering the complaint filed by Mr N. K. against the European Southern Observatory (ESO) on 21 July 2001 and corrected on 25 August, the ESO's reply of 18 December 2001, the complainant's rejoinder of 20 February 2002, and the Observatory's surrejoinder of 22 March 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant has German nationality and was born in 1949. He joined the staff of the ESO in April 1996 under a three-year contract as Head of Administration, at grade 13.

In July 1998 his contract was extended for a further three years, from 22 April 1999 to 30 April 2002. The relevant personnel action form contained a remark written by the Director General on 1 July 1998, which said: "In conformity with the approach used for other Division Leaders, [the complainant] should be considered for permanent contract on or about 21.04.2001." The new Director General reviewed the complainant's performance in October 2000 and filled out a report form headed "Performance Review 2000".

On 22 March 2001 a Review Board met to consider whether the complainant should be offered an indefinite appointment. The concluding sentence of a confidential "memo for the records" produced by the Board indicates that the Director General had decided not to offer the complainant either an indefinite contract or a contract extension.

The Director General wrote to the complainant on 25 April 2001 in the following terms: "With reference to our discussion this is to confirm that it is my intention not to extend your present contract which expires on 30 April 2002." The complainant is impugning that decision.

He wrote to the Director General on 28 June 2001 stating that it was "unlikely" that he would "continue [his] service ... beyond September 30, 2001"; he hoped that "a mutually acceptable solution for the precise terms and conditions of [his] departure" could be negotiated. After an exchange of correspondence to negotiate terms, the end date of his contract was brought forward to 30 September 2001, and his last day of service was 14 September 2001.

B. The complainant contends that the impugned decision is flawed and unlawful, principally because it was unsubstantiated. The case law requires that an administrative decision adversely affecting staff should be accounted for, but neither the impugned decision, nor any other related information given to him, disclosed any reason for the non-renewal of his contract. He does not know what prompted the Director General's decision and therefore has been deprived of the opportunity to respond to any allegations. There were no more than "vague allusions". The real reasons were not made clear.

Moreover, he had successfully served the ESO for more than five years, and had been led to believe that in the normal course of events it would grant him an indefinite contract. It is not clear from the Review Board's "memo for the records" on what grounds he was refused an indefinite contract, nor did the memorandum contain any meaningful indications as to the content of the Board's discussion. He assumes the Board would have had to apply criteria set out in an internal memorandum on contract policy issued on 4 September 1995. If so, it would have had to seek external opinions when it considered his case. There is no evidence that this was done, and his case was not referred to Council for a decision.

The complainant seeks the quashing of the impugned decision, and the award of all consequent redress, including material and moral damages, and costs.

C. The Observatory replies that the complaint is not well founded in law. The Director General's decision was discretionary and there was a valid reason not to renew the complainant's contract. He did not meet the ESO's requirements for the grant of an indefinite appointment or contract extension. The appraisal report drawn up in October 2000 contained certain reservations about his performance, and he did not contest that assessment. The Visiting Committee, which represents the international scientific community and has the task of evaluating the organisation's services to that community, drew up a report on ESO for the year 2000, and its opinion was also taken into account. In a confidential letter of 14 February 2001, which accompanied the report and was addressed to the Director General, the Committee's Chairman expressed concern about the Head of Administration.

While it is true that the impugned decision did not give reasons, the Director General explained the reasons for non-renewal verbally to the complainant in the week beginning 23 April 2001. It has again explained these reasons in its submissions to the Tribunal and this, by the terms of Judgment 477, is sufficient to enable the Tribunal to exercise its power of review of a discretionary decision.

Contrary to the view held by the complainant, in the personnel action form signed on 1 July 1998 the former Director General only pointed to the need to decide in April 2001 about whether to offer the complainant an indefinite appointment. The complainant was a head of division and, as stated in the memorandum of 4 September 1995 to which the complainant refers, a decision to grant a new fixed-term or indefinite contract for such staff members is taken by the Director General. Nonetheless, in this instance, the Director General took the decision to consult a Review Board composed exclusively of heads of division; she also consulted with the President of ESO's Council, although a decision by Council was not required since the complainant was not being offered a new appointment. In the complainant's case it was a question of contract expiry.

The ESO further submits that the complainant's letter of 28 June 2001 to the Director General in fact constituted a letter of resignation within the meaning of the Staff Regulations. It was thus he who put an end to his contractual relationship with the organisation. He thereafter entered into lengthy correspondence with the Director General negotiating the terms of an agreed settlement. The ESO eventually paid him the indemnities that applied in the event of resignation, taking 30 September 2001 as the date the contract ended. It holds that he is not entitled to any other payment. Moreover, he does not allege that he suffered any material damage.

D. In his rejoinder the complainant points out that in the report headed "Performance Review 2000" the overall rating for his performance was "good". He adds that he still does not know the real reasons for the non-renewal of his appointment.

He asks the Tribunal not to admit the "fragmentary evidence" supplied by ESO purportedly from the Visiting Committee. He had not previously been informed about the Committee's opinion and has no way of knowing if the letter of 14 February 2001 is authentic since the Observatory has produced only part of it.

The Observatory, he argues, is wrong to rely on Judgment 477, which concerned non-payment of an allowance. It is inconceivable that in a matter as serious as termination he should be obliged to file a complaint with the Tribunal in order to learn of the reasons for his separation.

E. In its surrejoinder the Observatory points out that under Article VI 1.02 of the Staff Rules no internal appeal procedure is provided for in the event of non-renewal of a contract and so the Tribunal is the only review body that is competent to hear his case.

Under Article R II 6.03 of the Staff Regulations the Director General was obliged to notify the complainant of her decision with regard to his contract at least six months before it expired. That was done. That article does not require the Director General to state the reasons in writing. Furthermore, the Observatory maintains its view that the opinion of the Tribunal as expressed in Judgment 477 is relevant to his case. According to that judgment, all that is required is that the lack of reasons for a decision should cause the complainant no prejudice. Having been informed in ESO's reply about the reasons for the non-renewal of the complainant's contract, the Tribunal is fully able to exercise its power of review and the complainant has suffered no injury through not having the reasons in writing. It notes that he has not contested its statement that the Director General gave him the reasons verbally.

The Observatory produces the full text of the letter of 14 February 2001 which was written by the Chairman of the Visiting Committee to the Director General. It adds that the views expressed therein as well as the complainant's performance gave the Director General valid reasons for not extending his contract.

## CONSIDERATIONS

1. The complainant impugns a decision of the Director General of the ESO not to renew his appointment as Head of Administration. His contract was due to expire on 30 April 2002.
2. The impugned decision was communicated to the complainant in a letter from the Director General on 25 April 2001, just over a year prior to the date of the expiry of the appointment. On the acknowledgement copy of that letter the complainant commented on the lack of "justification" (which the Tribunal understands as meaning "reasons") supporting the decision. Certainly, no written reasons were ever given and the Observatory, which has the burden in this respect, has failed to prove that any comprehensive verbal reasons were given to the complainant either before or after 25 April 2001.
3. The Tribunal's case law is consistent in requiring that every administrative decision affecting a staff member must be underpinned by reasons. In Judgment 1911 the Tribunal said:

"It is a general principle of the international civil service that there must be a valid reason for any decision not to renew a fixed-term contract and that the reason must be given to the staff member (see Judgment 1154)."

Reference may also be made to Judgment 2121, also delivered this day.

4. The Observatory argues, however, that it has complied with its obligations in this respect by explaining its reasons for the non-renewal of the complainant's contract in its reply to the present complaint. It cites and relies on Judgment 477 which it says supports this proposition. The Tribunal rejects the argument: the need to give reasons in support of adverse administrative decisions arises precisely because the affected staff member must be given an opportunity of knowing and evaluating whether or not the decision should be timely contested. To allow the reasons to be given only after a complaint has been brought before the Tribunal would be to encourage the bringing of complaints for which it would ultimately be shown that there was no justification. Judgment 477 turned on a specific finding that the complainant in that case had "suffered no prejudice whatever from the absence of a statement of the reasons for the impugned decision" since he had received copies of the documents which served as the basis for the decision prior to filing his complaint. The Tribunal's more recent case law, cited above, makes it clear that such line of argument is to be seen as a narrow exception to the general rule. It has no application here.

5. In its surrejoinder the Observatory also cites and relies on Judgment 1817. In that dispute it was clear that the complainant had been fully informed of the case against her not only during the internal appeal procedure but earlier as well. It was in that context that the Tribunal said:

"A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say."

6. Judgment 1817, far from helping the ESO, strongly confirms the view that the Tribunal has already expressed above. In the present case, because the ESO Staff Rules do not provide for an internal appeal of the impugned decision, the first opportunity for the complainant to learn fully why his appointment was not being renewed was with the delivery of the ESO's reply to the complaint. The Tribunal has already found that the ESO has failed to prove that adequate reasons were given by the Director General with the letter of 25 April 2001. Nor has the ESO proved that reasons were given orally. So the impugned decision cannot stand.

7. On the other hand, the complainant has altogether failed to prove that the impugned decision has caused him any material injury. As a result of correspondence entered into in the summer of 2001, he reached an agreement with the Director General to leave his post no later than 30 September 2001, seven months before the expiry of his appointment, in order to take up a new position with another international organisation. He says that there are some

aspects of his new salary and other benefits which are less advantageous to him but gives no detail whatsoever. While the Tribunal cannot accept the Observatory's plea that the complainant has in effect abandoned his claim by resigning before his term was up (it was after all his duty to mitigate his damages and the Observatory agreed to his early departure), the burden was on him to give some evidence of material injury and he has not done so.

8. Equally, on the question of moral damages the award must be relatively nominal. The complainant had no right to reappointment and even if proper reasons for the impugned decision had been given, it is difficult to see how this would have given any satisfaction to him. The Tribunal sets the amount of moral damages at 1,000 euros.

9. The complaint succeeds: the complainant is entitled to costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ESO shall pay the complainant the sum of 1,000 euros in moral damages.
3. It shall pay him 500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet