107th Session **Judgment No. 2842**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr U U against the European Southern Observatory (ESO) on 3 November 2007 and corrected on 25 March 2008, ESO's reply of 27 June, the complainant's rejoinder of 22 September, corrected on 25 September, and the Observatory's surrejoinder of 30 October 2008;

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

Having examined the written submissions;

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

A. The complainant, a German national born in 1950, joined ESO on 1 May 1991 as an Administrative Assistant under a three-year fixed-term contract which was extended several times. In July 1998 he was granted a contract of indefinite duration. He developed health problems in 2000 resulting in a long period of sick leave. On 16 August 2001 the Observatory's medical practitioner, Dr M., informed the Personnel Department that he had contacted the complainant's practitioner and that his absences were not due to an accident or illness incurred in the course of duty. The complainant's

health improved in 2002 and 2003 but he had a relapse in 2004 and thereafter was regularly on sick leave. During the first half of 2006 he was absent on sick leave for a total of 152 days. After having seen the complainant, Dr M. informed the Head of the Personnel Department, by a letter of 27 June 2006, that the complainant currently felt unable to perform his duties and that his incapacity to work was likely to continue.

By a letter of 28 June 2006 the complainant was offered the possibility of terminating his contract on 30 June 2007 by mutual agreement, on terms and conditions contained in the letter. It was proposed that he would be on special leave with pay from 1 July 2006 to 30 June 2007 and that, as of 1 July 2007, he would receive unemployment benefits for a maximum period of 50 weeks, during which ESO would pay its contributions to the Pension Fund. It was also indicated that the complainant would agree to the "final settlement of the termination of [his] contract" and not to claim or receive from the Observatory any other "grant, allowance, reimbursement or benefit related to the termination of [his] contract". The complainant signed the agreement on 30 June 2006.

The complainant wrote to the Head of Personnel on 14 September 2007 requesting that he be paid a termination indemnity in accordance with Article R A 11.03 of the Staff Regulations. The latter replied on 21 September that the complainant did not fulfil the requirements to be granted that indemnity. By a letter of 25 September 2007, the complainant asked ESO to pay him an indemnity of 136,300 euros. He contended that, in accordance with Articles R IV 1.58 and R A 11.02 of the Staff Regulations, he was entitled to a termination indemnity because of the early termination of his contract. He argued that it was not explicitly stated in the letter of 28 June 2006 that upon signing the termination agreement he waived his right to be granted such indemnity. He also relied on German law to support his request and added that he would bring the case before the "appropriate court" if it was not granted by 8 October 2007. By a letter of 1 October 2007, the Head of Personnel replied, on behalf of the Director General, that the complainant was not entitled to a termination indemnity. He also

pointed out that German law did not apply and that the Tribunal had "exclusive juridical competence".

Stating that the Observatory was "not interested in any out of court settlement", the complainant filed the present complaint, by which he impugns the letter of agreement he signed on 30 June 2006.

B. The complainant contends that the decision to terminate his contract of indefinite duration was not justified and that no reason for it was given. He adds that he received no legal advice and that no prior discussions took place. Moreover, the Staff Association was not informed of what was going on.

He asks the Tribunal to order the payment of "termination indemnities", material and "health" damages. He also seeks costs.

C. In its reply ESO submits that the complaint is irreceivable. It asserts that there is no administrative decision to challenge since the letter of 28 June 2006, signed by the complainant on 30 June, is a mutual agreement. Even if the agreement were to be considered as a decision, the complainant should have exhausted internal remedies prior to filing his complaint with the Tribunal.

On the merits the Observatory states that the statutory rules do not prevent the organisation and a staff member from terminating a contract by mutual agreement. It stresses that the terms of the agreement laid down in the letter of 28 June 2006 were clear and unequivocal. It points out that the complainant was granted 12 months' special leave with pay and subsequently unemployment benefits for 50 weeks as a final settlement; consequently, the agreement was fair. It adds that, in accordance with Article R A 11.01(g)(2) of the Staff Regulations, the complainant would have been entitled to a termination indemnity only if he had been dismissed owing to a medically certified permanent work-related disability; since this was not the case, his request should be rejected.

The defendant asserts that discussions and negotiations took place before the agreement was signed; the complainant could therefore have sought advice if he had wished to do so. In support of its assertion, it

provides a copy of a "Note for the record" dated 24 June 2008 in which the Head of Personnel stated that he had discussed the agreement in detail with the complainant. It adds that the Head of Personnel could confirm his statement before the Tribunal if need be. It further submits that the complainant did not, at the material time, avail himself of the possibility of being assisted by a member of the Staff Association during the negotiations and that he was not put under any pressure to sign.

D. In his rejoinder the complainant points out that ESO, in its letter dated 1 October 2007, indicated that the Administrative Tribunal of the International Labour Organization had exclusive jurisdiction in the present case. He therefore accuses the Observatory of acting in bad faith insofar as it contends that his complaint is irreceivable for failure to exhaust internal remedies.

On the merits he submits that he did not intend to terminate his contract; consequently there was no mutual agreement. He maintains that the details of the termination agreement were not discussed with him and that he did not understand the consequences of signing the offer of 28 June 2006. When visiting him in hospital in 2005, the Head of Personnel expressed concern at his repeated absence due to illness but talked to him only in general terms about the consequences of a termination of contract.

Contrary to the Observatory's assertion, he contends that his illness was work-related as his health deteriorated due to stress at work. In his view, the Observatory took advantage of his poor state of health and exerted pressure so that he would sign the letter of agreement. He indicates that the Head of Personnel asked him, on Friday 23 June 2006, to countersign it and return it by Monday, knowing that he was ill and not capable of understanding the financial consequences of his termination. Since he was given only three days, including the weekend, to return the letter of agreement, he was not able to seek advice about his rights. He also draws attention to his signature, which he says was not his usual one as evidence of his "psychological state" at the time. He contends that since he was

"induce[d]" to countersign the termination agreement, it was not a resignation; he should therefore be granted the termination indemnity.

The complainant claims the amount of 136,300 euros plus interest as from 30 June 2006 at the rate of 5 per cent per annum. He asks the Tribunal to hear Dr M. and also to allow him to produce a list of witnesses.

E. In its surrejoinder the Observatory maintains its position. It adds that the complainant has not produced evidence showing that he was abused or misled by ESO. It denies the allegation that the Head of Personnel was aware that the complainant's consent was vitiated; on the contrary, it states, the defendant tried to accommodate the complainant's interests as much as possible. It emphasises that the complainant suffered from a common illness which does not usually involve any impairment of judgement. In any case, according to Dr M., his illness was not work-related and was not permanent.

It reiterates that the complainant was not entitled to a termination indemnity as he was not dismissed owing to a medically certified permanent work-related disability nor was he dismissed owing to the suppression of his post.

The defendant points out that, even if one considers that the termination indemnity was due, the complainant's claim for it was time-barred as it was raised more than one year after the termination agreement was signed. Indeed, under Article R VIII 1.01 of the Staff Regulations, a claim for payment of such an indemnity is not admissible unless made within six months from the date on which payment became due.

In addition, it stresses that the complainant was offered and paid substantial financial benefits pursuant to the agreement he signed on 30 June 2006; the amount he received was in fact higher than that which he would have received pursuant to Article R A 11.01(g)(2) of the Staff Regulations concerning the dismissal of a staff member owing to a medically certified work-related permanent disability.

CONSIDERATIONS

1. The complainant joined ESO on 1 May 1991 as an Administrative Assistant. As of 1 July 1998 he was granted a contract of indefinite duration. His attendance and work performance were considered to be satisfactory. In 2000 he started frequently reporting sick. Dr M. informed the Personnel Department on 16 August 2001 that he had contacted the complainant's practitioner and declared that his absences were not due to an accident or an illness incurred in the course of duty. The complainant had no significant absences in 2002 and 2003 but reported sick in 2004, 2005 and 2006. On 27 June 2006 Dr M. informed the Head of the Personnel Department that he had seen the complainant and that he was being treated for several illnesses. He also noted that the complainant felt unable to perform his duties.

2. The Head of Personnel gave the complainant a letter dated 28 June 2006 and signed by the Deputy Director General, who stated, on behalf of the Director General, that he was offering to terminate his contract on 30 June 2007 by mutual agreement. A number of conditions were listed regarding leave, unemployment benefits, and contributions to the Pension Fund. He was asked to accept all the conditions and the final settlement of the termination of his contract in full, and to agree that he would not claim nor receive from ESO "any other grant, allowance, reimbursement or benefit" related to the termination of his employment with the organisation. The complainant signed the letter on 30 June 2006.

3. In his submissions the complainant contests that the above-mentioned letter was mutually agreed upon. According to him, no prior discussion took place on the said letter and he was given no reason for the termination of his contract. He claims damages and the termination indemnity on the grounds that he has never agreed to the termination of his contract. He explains that he countersigned the letter on 30 June in a state of stress which prevented him from understanding the consequences of his acceptance. He also seeks costs.

4. ESO submits that the complaint is irreceivable because there was no dismissal decision that the complainant could have impugned. It adds that even if the signed letter of 30 June 2006 were considered a decision, the complaint would still be irreceivable as the complainant did not exhaust all internal remedies prior to filing his complaint, as required under Article VII of the Statute of the Tribunal.

5. Because the complaint must be dismissed on the merits the Tribunal finds it unnecessary to consider the arguments of the organisation on receivability.

6. The Observatory submits that the complaint is devoid of merit as the complainant has signed the letter without being coerced or pressured to do so. Moreover, the conditions laid down in the letter were the result of earlier negotiations and discussions and were favourable to the complainant. The defendant also states that the terms of the letter and its consequences were clear and unequivocal. In addition, regardless of the signed letter, the complainant did not meet the requirements to be granted the termination indemnity as he was not dismissed owing to medically certified permanent disability incurred in the course of duty (Article R A 11.01(g)(2) of the Staff Regulations), nor was he dismissed owing to the suppression of post (Article R A 11.01(h)(2)(2)).

7. Having reviewed the written submissions and found them sufficient, the Tribunal disallows the complainant's request for hearings.

8. The Tribunal is of the opinion that the complaint is unfounded as the letter signed on 30 June 2006 was a mutually agreed termination of employment and not a decision by the organisation to terminate the complainant's contract. The complainant did not put forth any convincing evidence that he was incapable of making decisions or that ESO had acted in bad faith. The Tribunal notes that the organisation was diligent in its protection of the complainant's best interests in proposing the agreement so that he

would not suffer financially from the termination of employment prior to retirement age. The Tribunal also notes that quite apart from the terms of the letter, the complainant was not eligible for the termination indemnity in accordance with the applicable Staff Regulations. Indeed, contrary to the complainant's allegation, his contract was not terminated "on the ground of an illness provoked during his employment and caused by stress". In any case, the evidence shows that his illness was not work-related.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Catherine Comtet