

SIXTY-THIRD SESSION

In re MISCHUNG (No. 2)

Judgment 840

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Norbert Mischung against the European Southern Observatory (ESO) on 14 October 1986 and corrected on 29 October, the ESO's reply of 10 April 1987, the complainant's rejoinder of 5 August and the ESO's surrejoinder of 7 September 1987;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles I 4.01 and VI 1.03 of the ESO Staff Rules and Articles R VI 1.03 and 1.04 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. As is recounted in Judgment 780, under A, the complainant informed his employer, the Observatory, by a letter of 5 September 1984 that he had invented "monolithic reflector blanks and cells" to be used in large telescopes and that he would be applying for a patent. The ESO took the view that it owned the rights to his invention and on 22 February 1985 itself filed an application for a patent with the Patent Office of the Federal Republic of Germany. Doubting the newness of the invention, however, it offered on 27 June 1985 to transfer its rights to the complainant in return for an "irrevocable free licence". He turned down the offer. The Patent Office reported on 30 October that patents had been granted already for his invention. By a letter of 21 January 1986 the ESO's legal adviser informed him it had abandoned its application and it renewed its offer. The negotiations that followed came to nothing, and by a telex of 14 February the complainant asked the ESO either to pursue its application in West Germany and apply for patents in other countries or else transfer all rights to him unconditionally so that he could himself file applications. By a telex of 21 February its legal adviser answered that it would not transfer any rights to him and would itself be applying for a "European patent application relating to ESO's member States". On 20 March his counsel addressed a telex to its legal adviser objecting to the refusal of transfer. In a letter of 21 March the adviser invited him to lodge an internal appeal with the Director General in keeping with Article R VI 1.03 of the Staff Regulations ("Appeals shall be addressed in writing to the Director General ..."). After further correspondence the complainant's counsel wrote to the Director General on 24 April lodging an internal appeal against the refusal to treat the letter of 20 March as a proper internal appeal and claiming damages for the refusal of the transfer. In a letter of 7 May the Head of Administration answered that the Director General was referring the appeal to the Joint Advisory Appeals Board. The Board held that counsel's letter of 20 March had not been duly addressed to the Director General and it recommended rejecting the appeal. A letter of 5 August 1986 from the Director General informed the complainant that he did so.

By a letter of 4 June 1986 to the Director General the complainant's counsel had appealed against the refusal of damages. The reply of 15 July from the Head of Administration was that the letter of 7 May had merely confirmed what had been conveyed in the adviser's telex of 21 February and that no appeal could be entertained.

The complainant is impugning the decisions of 15 July and 5 August 1986.

In Judgment 780 the Tribunal held that the complainant was entitled neither to the patent rights nor to any compensation from the Observatory.

B. The complainant submits that the telex of 21 February 1986 conveyed no clear decision by the Director General against which appeal lay under R VI 1.04. Besides, his counsel's telex of 20 March 1986 did constitute a valid appeal: it was addressed to the legal adviser, who had acted for the Director General all along and had sent the telex of 21 February, and it therefore complied with R VI 1.03. For reasons of professional ethics his counsel could not address an appeal to the Director General. Since he exhausted the internal means of redress his complaint is receivable.

As to the merits, he submits that he should have full rights in his own invention.

He invites the Tribunal (1) to declare receivable his appeal against the "decision not to file a patent application in other countries than ESO's member States concerning [his] invention, based on the German patent application" and (2) to hold that the ESO ought to have transferred "unconditionally and in due time to [him] the vested rights relating to the invention ... for those countries in which ESO did not want to file patent applications". He claims (3) damages and costs.

C. In its reply the ESO submits that claims (1) and (2) are irreceivable because the complainant failed to exhaust the internal means of redress. Articles VI 1.03 of the Staff Rules and R VI 1.03 of the Staff Regulations say that appeals shall be made and addressed to the Director General, and Article R VI 1.04 of the Regulations sets a time limit of thirty days. The challengeable decision was the telex of 21 February 1986 and, not being addressed to the Director General, counsel's telex of 20 March was not a proper appeal.

Claim (3) is also irreceivable because again he failed to appeal within the thirty days against the refusal of damages implied in the telex of 21 February 1986.

Claims (1), (2) and (3) are, besides, devoid of merit. As the Tribunal held in Judgment 780, the ESO has full property in the invention.

That being so, the claim to costs too should fail.

D. In his rejoinder the complainant submits that he has suffered injustice in being denied rights which as an employee-

inventor he would have been guaranteed in any of the ESO's member States. Moreover, its internal appeal body is not independent.

The ESO's objections to receivability are technical: the formal requirements for lodging an internal appeal should not serve as traps to catch the unwitting official. As to claim (3), no refusal of damages may be read into the telex of 21 February.

Turning to the merits, the complainant submits that the ESO may not assert rights to an employee's invention in countries other than its own member States. It has acted arbitrarily by releasing the complainant's invention in non-member States without allowing him to protect his rights there.

E. In its surrejoinder the ESO enlarges on its pleas on receivability and on the merits. It observes that the rejoinder dwells on considerations of equity and that there was no breach of his contract or of the Staff Rules and Regulations and no abuse by the Director General of his authority in setting the terms of a possible settlement of the dispute. Judgment 780 recognised that the ESO's rights to the invention hold good outside member countries. The meaning of the telex of 21 February 1986 is beyond doubt.

CONSIDERATIONS:

1. The complainant joined the staff of the ESO on 1 November 1981 as senior engineer on a project involving the maintenance of a large telescope at La Silla, in Chile. During the course of his official duties he claimed invention of a cost-saving method of fabricating large high-precision monolithic mirror blanks for telescopes and other equipment. Under the provisions of Article I 4.01 of the ESO Staff Rules all rights, including patent rights arising from the invention, shall be vested in the Organisation at its request.

In March 1985, after an exchange of letters between the Organisation and the complainant's lawyer, the complainant appealed to the Joint Advisory Appeals Board against the refusal by the Organisation to acknowledge that he was entitled to adequate compensation. The Board rejected his appeal and he filed his first case with the Tribunal. In Judgment 780 the Tribunal held that the ESO is entitled to use the invention of the complainant, its employee, and to use it outside member countries, and that the complainant is not entitled to any patent rights in his invention nor to any compensation.

In his present complaint the complainant impugns, first, the Director General's decision of 5 August 1986 that the complainant's appeal filed on 24 April 1986 was out of time and therefore irreceivable and, secondly, a decision by

the Head of Administration dated 15 July 1986 that the final decision not to transfer patent rights to the complainant unconditionally had been made on 21 February 1986.

2. The case involves a simple point of procedure. Under Article R VI 1.03 of the Staff Regulations of the ESO appeals must be addressed to the Director General, and under Article VI R 1.04 they must be lodged within thirty days of the notification of the impugned decision. Here the complainant contends that the notice of appeal contained in a telex message dated 20 March 1986 addressed to the ESO's legal adviser was a valid notice of appeal against a decision notified to the complainant on 21 February 1986.

The argument fails because the language of the Rules makes it clear beyond doubt that any appeal against a decision taken on behalf of the ESO must be addressed to the Organisation, which alone is competent to judge the matter. The plea that notice to the ESO's legal adviser, who is not a member of the staff of the Organisation, is tantamount to notice to the Director General cannot prevail in view of the precise and unambiguous language of Article VI 1.03.

As to the so-called "decision" of the Head of Administration, examination of his letter of 15 July 1986 to the complainant's lawyer reveals that it contained no decision at all, but merely stated that the Director General's decision of 21 February 1986 was final and that no new decision would be taken.

It is the jurisprudence of the Tribunal that in order to be receivable under Article VII(1) of its Statute a complaint must respect not only the applicable time limits but also the procedure prescribed for filing the internal appeal. The Director General was fully justified in rejecting the complainant's appeal for non-conformity with the Rules, and accordingly the complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner