

## SIXTY-THIRD SESSION

### *In re* MISCHUNG (No. 3)

#### Judgment 841

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Norbert Mischung against the European Southern Observatory (ESO) on 24 April 1987 and corrected on 6 June, the ESO's reply of 8 July, the complainant's rejoinder of 8 August and the ESO's surrejoinder of 14 September 1987;

Considering Articles II, paragraph 5, and VII, paragraphs 1, 2 and 3, of the Statute of the Tribunal, Article I 1.01 of the ESO Staff Rules and Articles R II 6.12 and R VI 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. The complainant joined the ESO in November 1981 as a senior project engineer in the Telescope Group under a fixed-term appointment. In mid-1983 his duties were recast so as to concentrate on the technical development of mirror blanks for the ESO's astronomic telescope in Chile. On 27 April 1984 the Head of Administration, Mr. Bachmann, wrote him a letter saying he could not have an indefinite contract but offering a two-year extension up to 31 October 1986. On 7 May 1984 he asked for an explanation and in his reply of 28 May Mr. Bachmann said that it was because he had "not grown into the leadership of the project", that his duties had been redefined and that "only a temporary prolongation of [his] contract with the primary assignment on metal mirrors could be justified". He accepted the offer of extension.

As is recounted in Judgments 780 and 840, under A, it was in September 1984 that he told the ESO he had invented reflector blanks for the telescope, and his dispute with the Observatory over the rights to his invention forms the subject of his first two complaints and of those two judgments.

In a letter of 2 July 1986 Mr. Bachmann offered him special paid leave up to 31 October, in accordance with Article R II 6.12 of the Staff Regulations, so that he could look for another job. He accepted the offer on 25 July. On 19 August he wrote to Mr. Bachmann about his terminal entitlements and asked, among other things, for a "performance assessment covering my work done at ESO". Mr. Bachmann replied in a letter of 13 October to which he appended a text signed by the head of the Telescope Group and describing the complainant's "main area of activities" since 1981. On 29 October the complainant wrote asking for an "official ESO performance assessment" which should in particular say that the work he had done had led to an application for a patent. Mr. Bachmann's answer, dated 17 November, was that it was not ESO practice to make such assessments but that the text signed by his supervisor was altered to refer to the patent application. On 1 December the complainant wrote back demanding an assessment and saying that its absence might mar his future career. There followed attempts by his counsel and the ESO's legal adviser to settle the dispute over the rights to his invention. One term of settlement he insisted on was the making of an assessment according to a draft he had himself made. But the negotiations failed and on 26 February 1987, he says, he notified to the ESO his formal claim to an assessment: that is the date of a letter from his counsel to the legal adviser rejecting the proposed settlement.

B. The complainant is impugning the rejection which he infers from the ESO's failure to decide on his claim within the time limit in Article VII(3) of the Statute of the Tribunal. He says it is hard to find a job when he has no testimonial, something employers commonly ask for in West Germany. At least two potential employers have dropped him for want of one. As the ESO knows full well, the custom in West Germany and many other countries is to give testimonials signed by the head of administration or of personnel, not just by the supervisor. Though silent on the matter, the Staff Regulations do not preclude giving him one. The Observatory is wilfully damaging his career prospects. It unfairly linked the matter of the testimonial with the dispute over his invention and the patent applications. He states that agreement was reached in February 1987 on the text of the testimonial and he asks the Tribunal to order the ESO to give him forthwith an assessment drafted as then agreed upon.

C. In its reply the ESO contends that the complaint is irreceivable. The complainant made his claim in his letter of 19 August 1986 to Mr. Bachmann, who refused it on 17 November. That is the final decision and the complainant failed to challenge it within the time limit in Article VII(2) of the Statute of the Tribunal. The negotiations that ended in February 1987 did not extend the time limit.

Besides, the complaint is devoid of merit. The Staff Rules and Regulations do not require the giving of testimonials and the ESO is not bound by national practice in the matter. Like other international organisations, it provides no more than an objective description of the duties carried out. That does not harm the complainant since he may tell prospective employers that its practice is consistent. In any event he fell short of its expectations, and it is unwilling to express satisfaction in a testimonial. To have done with the complainant's constant grievances it considered letting him have an assessment as part of a settlement, but he has no entitlement to one when the negotiations have fallen through.

D. In his rejoinder the complainant comments in detail on issues of fact he believes to be misrepresented in the defendant's reply. He maintains that his complaint is receivable. The letter of 17 November 1986 cannot be treated as the final decision since the ESO was willing to reconsider the matter in the later negotiations: if that was indeed its final decision, it was negotiating in bad faith. As to the merits, he enlarges on his contention that the ESO is under a duty to give him a testimonial and asks why, if he fell short, he was offered an extension of contract in 1984.

E. In its surrejoinder the Observatory submits that the negotiations did not give rise to a new time limit for challenging the refusal of a testimonial since they related not just to the testimonial but aimed at settling all matters in dispute and were without prejudice to the position of either party in law. As to the merits, it observes that, though its rules do not so require, its practice is to give a certificate of service on request, it has given the complainant one, and the text is neither prejudiced nor misleading nor inaccurate.

#### CONSIDERATIONS:

1. The complainant was employed by the ESO as a senior project engineer involved with the maintenance of the ESO's observatory in Chile and served the organisation from 1 November 1981 until 31 October 1986. On 19 August 1986 he asked the ESO to prepare a performance assessment covering the work he had done while so employed. On 17 November 1986 the ESO supplied him with a letter signed by the Head of the Telescope Group setting out the main area of the complainant's activities. This was not satisfactory to the complainant, who sought the inclusion of a reference to his development work leading to the application of a patent and wished to have an official performance assessment, or certificate, in the form provided for under the laws and usage of the Federal Republic of Germany.

Subsequent negotiations between the legal advisers of the ESO and the complainant gave rise to a situation in which the complainant offered to withdraw a case pending before the Tribunal if the ESO would let him have a certificate in accordance with his draft and reimburse him for expenses incurred in preparing the patent application. No agreement was reached and the particular kind of performance assessment which the complainant sought was never issued.

The complainant in these proceedings seeks to compel the ESO immediately and unconditionally to release the certificate covering the assessment of his five years of service in the version suggested by him.

#### The merits

2. The rules do not require the ESO to provide the complainant with a performance assessment on the termination of his employment either in the form he seeks or in any other. The ESO is therefore not in breach of any term of the complainant's contract of employment in failing to provide him with a performance assessment. Further, as an international organisation it is not bound by the requirements placed on employers by the laws and usage of the Federal Republic.

In this case, in keeping with its practice, the ESO issued to the complainant a letter of reference setting out the duration of the contractual relationship and the main area of his activities. It was willing, exceptionally, to issue a qualified performance assessment certificate in the form specified by the laws of the Federal Republic as part of an overall settlement in which the complainant would be reimbursed in respect of certain expenses incurred by him

and he in turn would be required to give a written statement that all his claims arising from his employment with the ESO had been settled and that he would refrain from making any further claims or take any further action against the organisation. The complainant being unwilling to give such a statement, no settlement was reached. In the absence of agreement by both parties to the terms of the proposed settlement, the ESO is under no obligation to provide the complainant with the performance assessment he seeks and his claim dated 26 February 1987 against the ESO fails.

#### Receivability

3. Having dealt with the case on the merits, the Tribunal makes no ruling on the question of receivability.

#### 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