

EIGHTY-NINTH SESSION

In re Palma (No. 8)

Judgment No. 1948

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 2 July 1998, the ESO's reply of 21 October, the complainant's rejoinder of 21 November 1998 and the Observatory's surrejoinder of 12 January 1999;

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

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

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

A. The complainant, an Italian national, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

While in service with the Observatory the complainant contracted an injury to his left eye, resulting in substantial loss of sight. The ESO Rehabilitation Board set the degree of disability and the loss of earning capacity at 39 per cent.

In a letter of 3 March 1998 to the Director General of the ESO the complainant requested an "ESO Certification of Disability" stating that such a certificate was necessary for obtaining certain disability benefits and privileges from the Italian and German governments. Having received no reply he sent a second letter on 14 April appealing against the implied rejection of his request and inviting the Director General to consult the Joint Advisory Appeals Board. He is impugning the implied rejection of this appeal.

B. The complainant contends that both the Italian and the German applications for national disability assistance require a certificate of disability from the ESO. He argues that under Article R II 1.25 of the Staff Regulations "any member of the personnel shall be deemed to be a handicapped person when he is ... recognized as such by the Director General" and therefore the Director General is competent to provide him with the requested certificate. In addition, he argues that Article V 1.01 of the Staff Rules, which states "social security schemes shall safeguard ... the members of the personnel and their family against the economic consequences of illness, accident and disability", creates a moral duty for the ESO to help staff members to obtain national disability assistance. By not complying with his request the ESO has breached this moral duty and has violated its own rules and regulations as well as human rights principles as recognised by the International Labour Organization (ILO) and the United Nations.

The complainant asks the Tribunal to quash the implied decision and order the ESO to provide him with the requested certificate of disability. He also claims costs.

C. In its reply the ESO states that it does not object to receivability; nevertheless, the Tribunal might deem the complaint vexatious. In any case, it argues, the complaint is not founded in law. In addition, the complainant makes several allegations that are untrue or unrelated to the present complaint and the Observatory's silence on these allegations should not be construed as tacit agreement.

The complainant has incorrectly interpreted what is required in the application forms for national disability benefits. His disability should be certified by the appropriate public administration office of the country concerned. It is an error to assert that a certificate from the ESO would satisfy this requirement. There is no reason for the

ESO to provide the complainant with such a certificate. However, it would make available to the complainant copies of relevant documents upon request. The complaint is neither founded on the ESO's Staff Rules and Regulations nor on the general principles of international civil service law.

D. In his rejoinder the complainant argues that any finding of vexatious behaviour should be against the ESO for not responding to his appeals and forcing him to apply to the Tribunal for relief. He presses his arguments that the ESO must provide him with a certificate of disability.

E. In its surrejoinder the Observatory notes that the complainant's rejoinder does not dispute the Observatory's interpretation that the national laws of Germany and Italy do not require the ESO to furnish a certificate of disability. It presses its argument that this is the responsibility of the national offices for social welfare and that the ESO Convention does not grant the Observatory authority to issue such a certificate.

The complainant already possesses documentation, such as medical certificates and the findings of the ESO Rehabilitation Board, which he may use to support his claim to the national authorities. If requested by those authorities the Observatory would cooperate in providing further information but such cooperation has not yet been requested. The complainant errs in relying on Article R II 1.25 of the Staff Regulations which applies to "member[s] of the personnel" and only "within the meaning of the [ESO] Staff Regulations". It does not pertain to an application for national disability benefits from a "former staff member".

CONSIDERATIONS

1. On 3 March 1998 the complainant addressed a letter to the Director General of his former employer, the ESO, the relevant part of which reads as follows:

"I kindly ask ESO to provide me in 3 copies on Head Paper a CERTIFICATION OF DISABILITY, each set of three in ENGLISH, ITALIAN and GERMAN (in accordance to the attached sample ANNEX 1), where the main points, to be mandatory evidenced under pain of depriving me of national rights, are:

1. The nature and Structure of the ESO, in particular its relation with the Government of Italy and Germany;
2. My personal data and my contractual relation with the ESO;
3. The ESO process of definition of my disability;
4. Ascertainment and declaration of disability with concerned handicap;
5. Open Declaration corresponding to the truth, that ESO terminated my contract after that my disability was medically stated on 11.5.1994 and while it was still in phase of consolidation by 2.2.1995 (Date of handed letter of Notice);
6. Open declaration corresponding to the Truth, that ESO is denying me any possibility to be re-employed as handicapped in the Organization since 2.2.1995;
7. Open declaration corresponding to the Truth, that ESO threw me off of its premises in five minutes on 28.6.1995 without first assuring me Rehabilitation Measures, i.e. a Health Insurance, of which I still remain uncovered;
8. Final certification that ESO does not want to re-employ me anymore, even as handicapped, and ESO charges the national Administrations of ITALY and GERMANY of the duty to guarantee me "INTEGRATION OF HEALTH INSURANCE" and ALL PRIVILEGES AND ASSISTANCE FORESEEN BY THE NATIONAL LAWS IN FAVOUR OF HANDICAPPED PEOPLE, INCLUSIVE THE RIGHT TO CONCERNED SOCIAL NATIONAL HELPS AND OCCUPATION (provided that I still may work following a second disability under dispute)."

2. Not having received a reply, the complainant wrote again on 14 April 1998 to ask that the ESO answer his earlier letter.

3. By his complaint filed on 2 July 1998 he attacks the Director General's implied negative decision. He asks that the decision be quashed and claims costs.

4. The complainant clearly has no right to a certificate in the terms demanded. Many of such terms would negate specific findings made by the Tribunal in earlier judgments involving the complainant as noted below.

5. More particularly in Judgments 1665 and 1718, the Tribunal has already made a number of specific findings of facts with respect to the complainant's employment history and his subsequent dealings with his former employer. These may be summarised as follows:

(a) the complainant did not appeal against the ESO's decision not to renew his contract when it expired on 31 August 1995; it is accordingly no longer open to the complainant to argue that he was dismissed because of his disability (Judgment 1665 under 10);

(b) the complainant is not entitled to payment of an incapacity pension having been neither dismissed nor reclassified because of incapacity (Judgment 1665 under 11);

(c) the complainant was originally granted an unsuitability pension but later obtained *ex gratia* benefits equivalent to a 40 per cent partial incapacity pension; this, however, was not an incapacity pension (Judgment 1665 under 13 and 17);

(d) the complainant was informed in August 1996 that although he was not entitled to continued health insurance coverage through the ESO, the insurance brokers, Van Breda, were prepared to grant him coverage from September 1995 upon his paying 60 per cent of the normal premium; that offer was turned down by the complainant (Judgment 1718 under 4 and 5).

6. Apart from his assertions, for which he offers not a shred of evidence of fraud and bad faith on the part of the ESO, the complainant advances no argument which would justify the Tribunal in departing from its previous judgments or in ignoring the rule of *res judicata*.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet