

112th Session

Judgment No. 3099

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. A. against the European Southern Observatory (ESO) on 22 October 2009 and corrected on 6 January 2010, ESO's reply dated 29 March 2010, the complainant's rejoinder of 15 May 2010 and the Observatory's surrejoinder dated 7 July 2010;

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 joined ESO as a technical assistant in 1990 under a fixed-term contract for local staff at the La Silla Paranal Observatory in Chile. Following the expiry of that contract in March 1996, he successfully applied for the post of Electronics Technician, to which he was appointed on 5 July 1996 under another fixed-term contract. He obtained a contract of indefinite duration as of 1 July 2003.

In May 2009 ESO management was informed that during the night of 9 May an unknown person had entered a room where a female visiting astronomer was sleeping. It appeared that the perpetrator had

deactivated the supply of electricity before entering the room. Shortly after this incident, ESO management became aware of two earlier incidents showing the same *modus operandi*. ESO mandated the Deputy Director of the La Silla Paranal Observatory and a Human Resources Officer in Chile to investigate these cases. Having ascertained that the complainant was one of several individuals who had been on the premises at the time of each of the three incidents, they interviewed him several times.

On 12 June 2009 the Director General decided to place the complainant on special leave with pay while investigations were in progress. It was specified that this was an administrative measure having no disciplinary character. The complainant appealed this decision by a letter addressed to the Director General on 22 June. He objected to the “aggressive and exhausting” questioning to which he had been subjected and stated that, as a preventive measure and upon instructions of the La Silla Staff Union, he had recorded the last interview of 11 June and had made a statement to the Chilean police. This admission prompted the Director General to order a hearing of the complainant to determine whether his actions amounted to misconduct. The hearing took place on 8 July 2009 at ESO premises in Santiago in the presence of a translator, the Director of Operations and of the La Silla Paranal Observatory, the Head of the Human Resources Division and the Director of the La Silla Staff Union.

By a letter of 24 July 2009, which constitutes the impugned decision, the complainant was informed that the Director General had decided to dismiss him without indemnities for secretly taping an internal and non-public interview and distributing the recording to third parties. In particular, the disclosure of the interview to the La Silla Staff Union had resulted in serious disturbance to the working climate at the La Silla Observatory and was likely to hinder the investigation and prevent ESO from fulfilling its duty to protect female staff effectively. The letter concluded: “your behaviour and attitude constitutes a serious non-fulfilment of your contractual duties, serious breach of faith and loyalty to the Organisation and its Management as well as a demonstrated lack of integrity justifying the disciplinary measure of termination of contract”. In August 2009 the complainant

sent a letter of appeal to the Director General, who authorised him to challenge his dismissal directly before the Tribunal.

B. The complainant contends that the impugned decision lacks any legal basis and is vitiated by an error of law. He submits that ESO terminated his employment on grounds not covered by the Regulations for Local Staff in Chile (RPL), as it justified its decision on the ground that the “[u]nauthorized taping of the words of another person, which are not spoken in public, constitutes a serious criminal offence in the national law of many countries including Chile”, which is not one of the grounds for dismissal without indemnities mentioned in Article No. II 5.02 of the Local Staff Regulations (Article RPL II 5.02).

Additionally, he invokes an error of fact and argues that his actions in no way constituted a serious breach of his contractual duties, let alone a serious offence. He alleges that the recording related only to his own statements made during the interrogation and that it has been disclosed neither to third parties, nor to the La Silla Staff Union, nor to the public at large. He therefore denies that his actions breached the provisions of Article RPL I 3.07, which relevantly provides that:

“Any communication to the public by a Local Staff Member, either identifying him as such or in connection with the work of the Organisation shall be subject to the express and prior approval of the Director General [...]”

He submits that the recording of his own statements was a legitimate defence against the charges brought against him and that his actions caused no harm or damage to any person, let alone his employer. He alleges that he was pressured, persecuted and threatened in the course of the investigation, which affected his health. Faced with the possibility of being wrongly found to have participated in the events that triggered the investigation, he consulted the La Silla Staff Union, whose members advised him to keep a record of his statements.

He further argues that a serious breach of contractual duties necessarily implies that the staff member’s acts were performed in the

fulfilment of the duties for which he or she was appointed, and that only certain breaches will justify the sanction of dismissal without indemnities. Consequently, the assertion that the recording and its disclosure to third parties and the public constitutes a criminal act and a serious breach of his contractual duties is premised on an error of fact and law. More generally, the complainant also contends that the protection afforded to Chilean workers under the applicable legal framework is inadequate.

The complainant asks the Tribunal to set aside the impugned decision, order his reinstatement in his former position and order the payment of his salary since the termination until reinstatement, or, alternatively, to order the payment of the indemnity for end of service, with interest. He also claims material and moral damages, as well as costs.

C. In its reply ESO submits that the complainant's claims are entirely devoid of merit. It deplores the complainant's allegation that its legal framework leaves Chilean workers unprotected and stresses that the Regulations for Local Staff have always provided for their legal protection in accordance with the principles of international civil service law, allowing, in particular, ESO local staff to bring complaints before the Tribunal.

The Observatory also objects to the complainant's allegations of persecution and notes that he does not provide any detail or evidence to corroborate them. It submits that the complainant was interviewed three times with respect to the incidents that occurred at the La Silla Observatory, the first two interviews lasting less than an hour and the third, which took place at ESO's premises in La Serena, lasting less than two hours. The Human Resources Officer in Chile suggested to the complainant that he be accompanied by a Staff Union member, but he refused. The defendant also notes that none of the other 13 persons interviewed has complained of having been exposed by the interviewers to persecution, pressure, threats or harassment.

ESO points out that the disclosure of a copy of the recording to the La Silla Staff Union, although denied in the complaint, has already

been admitted by the complainant in his letters of 22 June and 3 August 2009. Similarly, the complainant omits to mention that he informed the Chilean police of having been subjected to “psychological violence” and “torture” by the two ESO officials in charge of the investigation, as admitted at the meeting of 8 July 2009, where he added that this was done with a view to possible future action against these officials.

The Observatory submits that the impugned decision is not tainted by any procedural or substantial flaw. The facts justifying the dismissal were established beyond any doubt by the complainant’s own admissions and he was given a hearing before the disciplinary measure was taken. The unauthorised recording of conversations, be they of a private or of an official nature, and the disclosure of such recordings to third persons, represent misconduct which is incompatible with the functions of a staff member. Contrary to what the complainant asserts, such conduct also constitutes a punishable crime under national laws, both in Europe and in Chile. Such conduct undermines trust and good faith, especially when it is made, as in the present case, with a view to denouncing senior personnel acting on instructions. Moreover, it was likely to hamper a particularly sensitive and important investigation involving the protection of other staff members.

According to ESO, such acts constitute a serious breach of contractual duties, as the complainant had a duty to use the procedures available under the Local Staff Regulations to protect his interests. To involve the national police force in the internal investigation constituted an unlawful communication to the public and, at the same time, a blatant disregard of the loyalty the complainant owed to ESO as a staff member and, consequently, a lack of integrity.

ESO further argues that the disciplinary sanction of dismissal without indemnities was proportionate to the gravity of the complainant’s misconduct. The fact that the Director of the La Silla Staff Union suggested that he should record the interview does not excuse his actions.

D. In his rejoinder the complainant presses his pleas. He points out that ESO is introducing a new ground in its reply, namely his alleged lack of integrity, which was not invoked in the letter of dismissal. He contests the defendant's assertion that none of the other 13 staff members interviewed complained about any pressure or harassment by the investigators, and adduces two e-mails as evidence of such complaints. He maintains that none of the requirements for the severe sanction of dismissal without indemnities was fulfilled in his case and argues that, in order for the non-fulfilment of contractual duties to justify termination without indemnities, it must be serious and cause severe damage to the Observatory, which bears the burden of proving such facts.

E. In its surrejoinder ESO maintains its position. It denies that the letter of termination did not mention the complainant's lack of integrity as a ground for dismissal and reiterates that the impugned decision was not out of proportion. It also emphasises that, in accordance with the Tribunal's case law, the impugned decision is a discretionary decision and therefore subject to only limited review. In this case the decision was clearly taken with authority by the Director General and following the proper procedure. It is based on established facts and justified by the Local Staff Regulations. Furthermore, the complainant has put forward nothing which would indicate an abuse of authority.

CONSIDERATIONS

1. The complainant, a Chilean national, was dismissed without indemnities from his post of Electronics Technician at the ESO Observatory in Chile on the remote and isolated La Silla mountain on 24 July 2009. He initiated an internal appeal against that decision. However, the Director General authorised him to proceed directly before the Tribunal.

2. The background to the complainant's dismissal is to be found in events at the La Silla Paranal Observatory on the night of

9 May 2009 when, according to ESO, “an unknown person [...] entered a room where a female visiting astronomer was sleeping”, the intruder having deactivated the room’s electricity supply before entering and reactivated it upon leaving. ESO later learned of two similar events involving, respectively, a visiting female astronomer and a female staff member on 11 April 2009 and 9 July 2005 respectively. It then initiated an investigation, involving interviews with 14 individuals who had been present at the La Silla Observatory on some or all of those nights.

3. The La Silla Staff Union was advised of the investigation on 15 May 2009. It wrote to various officials of ESO on 18 May urging that the investigation be undertaken by “[a]uthorities who are competent in criminal matters”, adding that it did not believe that “an internal investigation [was] sufficient”. ESO continued with its investigation and the Union forwarded a further communication on 22 May protesting that “the investigation [...] was discriminatory and prepotent” as the investigators “interrogated only Chilean staff under permanent threats and applying labour sanctions based on events that have not been legally prove[n]”. It wrote to the Director General on 11 June 2009, reiterating its view that the internal investigation should be stopped and the matter referred to “Chilean authorities competent in criminal offen[c]e issues”. It also complained that the investigators had “applied hostile interrogation[s] [...] to the 10 ‘suspects’ [...] submitting them to the terror of being dismissed from their jobs [...] and [...] by saying that due to their ‘silence’, the La Silla Observatory could be closed”. In this letter, it was also stated that in June a Chilean citizen had been interrogated at La Serena, a city situated at some distance from the La Silla Observatory.

4. According to the complainant he was interviewed on four occasions: according to ESO he was only interviewed on three occasions. No record has been produced for any of the interviews. In any event, it is agreed that the complainant was interviewed at ESO premises at La Serena on 11 June 2009. Following that interview, he was put on special leave with pay on 12 June 2009 on the ground that

the ESO management concluded that “the investigation procedure would benefit from [his] temporary absence from the La Silla Observatory”. The complainant lodged an appeal on 22 June 2009 against the decision to place him on special leave.

5. In his appeal of 22 June 2009 to the Director General the complainant noted that, as a result of his being placed on special leave and being kept away from the La Silla Observatory, his colleagues considered he was guilty of the offence that occurred there. He also complained of “the aggressive and exhausting questioning regarding facts – in which [he] had neither participation nor knowledge”. He added that:

“as a preventive measure and in order to prepare myself to defend my honor and my interests, I have been requested by my Union to tape the questioning and to keep a record in ‘Carabineros’, [‘constancia’, in Spanish] which I did on Thursday June 11 at the ESO offices in Avenida El Santo, La Serena.”

6. The Director General formed the view that the actions disclosed by the complainant in his letter of appeal were apt to constitute misconduct and the complainant was called to a meeting on 8 July 2009. On this occasion, the Union representative, the La Silla Staff Union Director, was present, as well as someone who acted as translator. A record was kept of that meeting in which the complainant seemingly stated that he had retained the original tape (“file”, in the record of interview) and given a copy to the Staff Union representative. He also admitted making a statement to the police with respect to the “psychological violence/torture applied [...] during the interviews” and offered to provide a copy of the statement to ESO. The offer was rejected. The Union representative confirmed that the complainant had acted on his advice and indicated that he took responsibility for what had occurred. He also asked that ESO “terminate the special leave [...] to rehabilitate [the complainant]” and stressed the complainant’s “difficult mental situation”.

7. The complainant was informed by letter of 24 July 2009 that the Director General had decided to dismiss him “without entitlement

to the indemnities foreseen in [Article RPL] II 5.02” with effect from 31 July of that year. Article RPL II 5.02 allows for dismissal “without entitlement to the indemnities” prescribed in Article RPL II 5.07 for various acts, including leaving the place of work inopportunistically and without justification, refusal to perform work, negligence affecting safety or health and intentional damage. Specifically, it allows for dismissal without indemnities for:

- “1) lack of integrity, violence, insults or serious immoral conduct duly demonstrated;
- 2) acts committed [...] in connection with [a staff member’s] work which have explicitly been prohibited in writing in his contract or in these Regulations;
- [...]
- 7) serious non-fulfilment of contractual duties.”

8. The letter informing the complainant of his dismissal stated that that course had been taken on the grounds of “serious non-fulfilment of [...] contractual duties and [...] demonstrated lack of integrity”. The specific acts relied upon were:

- the “secret” taping of “an internal and non-public interview on 11 June 2009”;
- distributing “the taping to third parties”; and
- making “related communications [...] to the Chilean police”.

It was also said in that letter that the “[u]nauthorized taping” of “the words of another person, which are not spoken in public, constitutes a serious criminal offence in the national law of many countries including Chile” and that “[t]he recording, divulgation [sic] of the tape and its content to the La Silla Union has [...] led to a serious disturbance of the working climate on La Silla”. In its reply ESO refers to Article RPL I 3.03 which relevantly requires Local Staff Members to “refrain from any act or activity [...] which would be morally or materially detrimental to the Organisation”, as well as Article RPL I 3.07 which, subject to an immaterial exception, prohibits “[a]ny communication to the public [...] either identifying [the person concerned as a Staff member of ESO] or in connection

with the work of the Organisation [...] [without] the express and prior approval of the Director General”.

9. ESO claims in its reply that the complainant has not produced “any shred of evidence that the ESO [investigators] [...] might have used abusive forms of interrogation” and asserts in the same document, that none of the other interviewees complained to ESO of the interrogation methods used. Neither statement is correct. Even though they may be motivated by special interest and thus less than completely objective, the communications from the La Silla Staff Union are apt to constitute evidence of the nature of the interrogations. Further, the complainant has produced evidence of a complaint by a staff member to ESO of “inappropriate pressure”, including: “when I have been yelled, accused of being a liar, intimidated [...] threatened of being fired because my name is in a short suspect list [sic]”. He has also produced evidence of a complaint by another person to the La Silla Staff Union of “having a bad time with the interrogations”.

10. ESO also contends that staff members were told that they could have a Staff Union representative present during interviews but that the Union failed to cooperate. This is denied by the complainant. Whatever the situation, the obligation to treat staff members with dignity and the duty of good faith required, at the very least, that there be an accurate record of the interviews, which could have been achieved by, for example, the making of a transcript by a competent stenographer. As earlier noted, there is no evidence that ESO or its officials maintained any record of the interviews, as was apparently done at the meeting of 8 July 2009 when the complainant was charged with misconduct. Nor is there any evidence that there was anyone present to act as translator, as also occurred on 8 July 2009. Further, there is no evidence that a representative of the La Silla Staff Union was present at La Serena, as distinct from the hearing at Santiago on 8 July, when the complainant was interviewed on 11 June 2009.

11. Even if the taping of a “private conversation” is forbidden by Chilean law, it is doubtful whether an official interview as part of an

investigation into actions which, quite possibly, constituted a criminal offence is properly described as a “private conversation”. Although staff members of international organisations necessarily have the right to protect their own interests, they must act in conformity with their duty as international civil servants. In the absence of an established procedure to ensure that an accurate record was made and kept of interviews conducted in the course of an investigation such as that being undertaken by ESO at the relevant time, the taping by a staff member of the interview and the subsequent provision of the tape, or a copy of it, to the La Silla Staff Union may be seen as an action directed to the protection of his or her interests but cannot readily be accepted as compatible with the standards of conduct required of an international civil servant.

12. ESO contends that the taping of the interview of 11 June 2009 and the provision of it or a copy of it to the La Silla Staff Union constitutes “misconduct which is incompatible with the functions of a staff member” as it “undermines elementary trust and good faith in the verbal interactions of the Organisation in matters concerning its personnel” and is, also, “a serious non-fulfilment of contractual duties [...] as the complainant ha[d] a contractual duty to use the procedures available under the Staff Regulations for protecting his interests”. In this last regard, ESO states that if the complainant

“believed to have reason to fear the questioning, he could have asked to be assisted by a member of the La Silla Union or any other person of his trust and if he felt to have been unfairly treated by the interviewers he had a duty to call upon the Director of the La Silla [...] Observatory, the Head of Human Resources or, in the last event, the Director-General.”

These arguments would have force if there had been established procedures for the conduct of interviews of the kind being undertaken and for ensuring that a complete and accurate record was kept of the interviews. In the absence of evidence of any such procedures, it cannot be said that there were procedures available to protect the complainant’s interests. Further, the duty to protect the dignity of staff members and ESO’s obligation of good faith towards them required that there be such procedures. And only if there were such established procedures could it be said that the complainant’s

actions “undermine[d] elementary trust and good faith”. However, and as already indicated, taping the interview of 11 June 2009 and providing a copy of it to the Staff Union, was “incompatible with the [complainant’s] functions [as] a staff member” and therefore constitutes misconduct, but it cannot be regarded as “serious non-fulfilment of [his] contractual duties” for the purposes of Article RPL II 5.02(7). The question whether that conduct constituted “lack of integrity” for the purpose of Article RPL II 5.02(1) will be considered later.

13. As to the complainant making a statement to the Chilean police, ESO contends that:

“[t]o involve the national police force in the internal ESO investigation constitutes an unlawful communication to the public (Art. RPL – I 3.07) and, at the same time, a blatant disregard of the loyalty [the] complainant owes to ESO as a staff member and, consequently, a lack of integrity (Art. RPL II – 5.02 No. 1).”

As earlier noted Article RPL I 3.07 proscribes “[a]ny communication to the public” which identifies the person concerned as a staff member or in connection with the work of ESO. There is nothing to suggest that the statement made by the complainant was in connection with the work of ESO. However, it may be assumed that it did identify him as a staff member. The expression “communication to the public” must be construed as referring to a statement that is made to the public at large, not to individual members of the public. In this regard, it is most unlikely that Article RPL I 3.07 was intended to prevent a staff member from informing his friends and associates that he worked at ESO. As the making of a statement to the Chilean police is not a communication to the public at large, it cannot be taken to constitute an infringement of Article RPL I 3.07. Moreover, Article RPL II 5.02(2), which is concerned with the grounds upon which a staff member may be dismissed without indemnities, relevantly refers to “acts committed [...] in connection with [a staff member’s] work which have been explicitly prohibited [...] in these Regulations”. It may be accepted that the complainant’s statement was connected with his employment, but there is nothing to establish that it was connected with his work. Although, and as with the taping of the interview of 11 June 2009, it

may be accepted that the making of a statement to the police was incompatible with the complainant's status as an international civil servant and thus constituted misconduct, ESO has not established that it fell within any of the grounds for dismissal without indemnities under Article RPL II 5.02.

14. ESO argues both in relation to the taping of the interview on 11 June 2009 and the making of a statement to the Chilean police that the actions demonstrated a "lack of loyalty". However, "lack of loyalty" is not the same as "lack of integrity". The latter expression indicates dishonesty, deceit, some underhand dealing or the like. The only conduct of the complainant that could fall within the notion of "lack of integrity" is his taping of the interview of 11 June 2009 without disclosing his intention to do so. In no other respect, has there been any demonstrated dishonesty or lack of integrity.

15. Once it is accepted that, even though there was misconduct, the only matter that can be said to fall within Article RPL II 5.02 is a lack of integrity in the complainant's failure to disclose his intention to tape the interview of 11 June 2009, the question arises whether the decision to dismiss him without indemnities was justified. It is well settled that a "disciplinary authority has a discretion to determine the severity of a disciplinary measure [...] provided that the measure adopted is not manifestly out of proportion to the offence". (See Judgment 2944, under 50.) The ESO Regulations for Local Staff in Chile provide in Article RPL II 4.02 for the following disciplinary measures:

- “- a written reprimand;
- suspension from work for a period not exceeding one month;
- termination of contract under the conditions laid down in Art. RPL – II 5.02.”

In Judgment 210, under 4, the Tribunal noted that the rules applicable in that case provided for a range of penalties and stated that “the principle of proportionality will ensure that extreme penalties, such as summary dismissal, are applied only to the gravest cases”. Bearing in mind the circumstances and especially the fact that the complainant

was acting on the advice of the La Silla Staff Union, the present case cannot be said to be among the gravest. However, the Director General applied the extreme penalty of dismissal without indemnities. His decision cannot stand.

16. The complainant seeks reinstatement. This is resisted by ESO by reference to actions of the complainant following his dismissal, including the publication on a website of an article entitled “A land outside the Jurisdiction of Chilean Laws” in which he was critical of the conduct of ESO and of the actions of the Chilean Government in granting ESO immunity from Chilean laws. In these circumstances, reinstatement will not be ordered. However, the complainant is entitled to substantial material and moral damages which the Tribunal assesses at 30,000 United States dollars. He is also entitled to the indemnities provided for in Article RPL II 5.07 together with interest at the rate of 5 per cent per annum from 31 July 2009 until the date of payment. He should also be awarded legal costs which the Tribunal fixes at 5,000 dollars.

DECISION

For the above reasons,

1. The Director General’s decision of 24 July 2009 is set aside.
2. ESO shall pay the complainant material and moral damages in the sum of 30,000 United States dollars.
3. It shall pay the complainant indemnities in accordance with Article RPL II 5.07 of the ESO Regulations for Local Staff in Chile, together with interest at the rate of 5 per cent per annum from 31 July 2009 until the date of payment.
4. It shall also pay the complainant’s costs in the amount of 5,000 dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-

President, and Mr Patrick Frydman, Judge, sign below, as do I,
Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Patrick Frydman
Catherine Comtet