

SIXTY-EIGHTH SESSION

In re MAUGIS (No. 4)

Judgment 997

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Michel Maugis against the European Southern Observatory (ESO) on 27 February 1989, the ESO's reply of 17 April, the complainant's rejoinder of 19 May and the ESO's surrejoinder of 28 June 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles I 1.05, VI 1.01 and VI 1.04 of the Combined Staff Rules of the ESO and Articles R II 4.34, R VI 1.03 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. Article R II 4.34 of the ESO Staff Regulations reads: "Home leave shall be granted to non-resident members of the personnel whose contract runs for at least two years. It shall be spent in the country of their home station. ...".

The complainant, a Frenchman, served the ESO in Chile from 1979. He applied in September 1988 for permission for him and his family to take home leave in France in December 1988, as a telex of 15 September from the ESO's office in Chile informed headquarters in the Federal Republic of Germany. Headquarters answered in a telex of 16 September that since his contract was to end on 31 October he must return from home leave by that date. He sent headquarters another telex on 21 September asking for more information and in a letter of the 22nd asked the Director-General to take a decision. In a telex also of the 22nd the Assistant Head of Administration replied that his period of entitlement ran from 1 October 1988 until 30 September 1989; he might take home leave from 1 October but must be back by 31 October since after that date he would not be a staff member.

In a letter of 28 September 1988 to the Director-General he said he wanted to consult records at headquarters the better to plead his case against the termination that forms the subject of his second complaint (see Judgment 996). In a letter of 6 October the Head of Administration confirmed on the Director-General's behalf the decision in the telex of 22 September. On 10 October the complainant wrote pressing the matter and asking that the journey be treated as travel on business or, failing that, on home leave. The Head of Administration sent a telex on 11 October again authorising him to take home leave by 31 October. Yet on 13 October he wrote a letter to the Director-General asking for a decision. The Director-General answered in a letter of 5 November that the decision, which he had delegated his authority to take, had been in the telex of 22 September from the Assistant Head of Administration.

The complainant left the ESO on 31 October. He, but not his family, went to France on 17 October and returned to Chile on 2 November. By a letter of 18 November from Santiago to the Director-General he appealed under Article R VI 1.03 of the ESO Staff Regulations against the decision not to let him and his family take home leave after 31 October. By a letter of 8 December 1988, the decision he impugns, the Director-General pointed out that the decision was in the telex of 22 September and he had not challenged it within the time limit of thirty days in R VI 1.04; besides, according to R VI 1.01 only a staff member might appeal; his appeal was irreceivable.

B. The complainant points out that, though R II 4.34 confers the right to home leave on staff only, it does not require the staff member to exercise it while under contract. Other rules make it plain that a staff member may exercise certain rights even when he has left. For example, Articles VI 1.01 and VI 1.04 of the Combined Staff Rules allow appeals by staff members to the Director-General and to the Tribunal; if former staff could not appeal too no appeal could ever lie against dismissal that had taken effect. And other articles bestow rights that accrue only when the staff member leaves.

Besides, a reasonable time must be granted in which to exercise a right. The complainant acquired the right to

home leave on 1 October 1988, but it was not convenient for his children to leave then, in the middle of the school term. It was unreasonable to construe the rules to his detriment and contrary to their spirit too, the purpose of home leave being to let expatriates keep in touch with home: they should have latitude in choosing the dates.

In any case it was wrong not to let him take home leave after October when the Director-General himself had terminated his contract on other than disciplinary grounds. The circumstances being exceptional, the Director-General should at his discretion have let the complainant exercise his right after the short period proposed.

He seeks the quashing of the impugned decision and an award of 10,000 United States dollars in damages.

C. In its reply the ESO contends that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress. It was the telex of 22 September that refused him permission to take leave after 31 October 1988, and under R VI 1.04 he had thirty days in which to appeal to the Director-General. He did not do so until 18 November. His retort is that only from the letter of 5 November did he learn that the decision of 22 September had been the Director-General's, so he did appeal in time. But in the international civil service an executive head may always delegate authority, and competence over matters of leave is commonly delegated even to officers lower in rank than an assistant head of administration. Article I 1.05 of the Combined Staff Rules empowers the Director-General to delegate his authority. The letter of 6 October from the Head of Administration merely confirmed the earlier decision and set off no new time limit.

The ESO has subsidiary arguments on the merits. The wording of the rules makes it plain that only serving staff may go on home leave. So the complainant was no longer entitled after 31 October 1988. Besides, as to his own travel expenses there is no cause of action since the ESO refunded them. As to his wife and children, his complaint is devoid of merit because their entitlement expired with his. The dates of a school term would afford no valid reason for taking leave outside the authorised period even if the claimant were still a staff member.

D. In his rejoinder the complainant addresses the ESO's objections to the receivability of his complaint.

In his submission decisions by junior officers should not be invariably treated as the Director-General's own. The second paragraph of R VI 1.04 provides for the start of a new time limit when the Director-General "does not take action within sixty days in response to a written claim". The telex of 22 September being unclear, the complainant was bound, before appealing, to ask the Director, General to confirm that the decision was his. That was the purpose of his letters of 22 September and 13 October to the Director-General, which amounted to a "written claim" within the meaning of the second paragraph of R VI 1.04. The Director-General's answer was in the letter of 5 November and he lodged his appeal on 18 November, within the time limit in R VI 1.04.

E. In its surrejoinder the ESO submits that what the complainant is challenging is the refusal of permission to take his home leave in December: that decision was in the telex of 22 September 1988, and he failed to challenge it in time under R VI 1.04. It is not the purpose of the second paragraph of that rule to reopen a time limit that has already expired under the first paragraph.

CONSIDERATIONS:

1. In 1987 the complainant, a Frenchman who had joined the staff of the ESO in 1979 at La Silla, in Chile, had difficulty over his fourth period of home leave, which he wanted to take from December 1987 to March 1988. Since that period occurred during an odd-numbered year of his service the ESO refused his request and, after exhausting the internal means of appeal, he filed his first complaint with the Tribunal. In Judgment 945 the Tribunal held that according to ESO staff rules home leave was to be taken in each even-numbered year of service and accordingly dismissed his complaint. It also dismissed in Judgment 980 his first application for review of Judgment 945.

2. In the course of correspondence about his fourth home leave the Head of Administration informed the complainant by a letter of 5 November 1987 that his next entitlement to home leave - his fifth - would be fore the period from 1 October 1987 to 30 September 1989 and he would have to take the leave between 1 October 1988 and 30 September 1989.

3. The complainant went home at his own expense in December 1987 with his family. While he was in Europe the Head of Administration wrote him a letter dated 28 December informing him that he would be transferred, if he gave his consent, to headquarters at Gardhing, in the Federal Republic of Germany, or, if he preferred, might have

the termination of his contract with the end-of-service entitlements. The complainant having refused both options, the Director-General decided on 19 April 1988 to dismiss him at 31 October 1988 and to put him on paid leave until that date. The Director-General rejected his internal appeal and confirmed the dismissal by a decision dated 7 September 1988, and his second complaint appealing against that decision is allowed in Judgment 996.

4. On learning of the confirmation of the dismissal the complainant applied to the personnel service in a telex of 15 September 1988 for permission to take his fifth home leave in December 1988 with his family. The reply, which came in a telex dated 22 September from the Assistant Head of Administration, was that since his contract was to end at 31 October he could not be on home leave after that date.

5. By then the complainant was drafting this complaint to the Tribunal against dismissal and wanted to go to consult records at ESO headquarters. In correspondence with headquarters the first inquiry he made about the matter of home leave was whether the Director-General himself had taken the decision. The Head of Administration replied on the Director-General's behalf in a letter of 6 October 1988 that the telex of 22 September 1988 had been both "self-explanatory and correct" though the complainant was "certainly entitled to explain [his] opinion on this decision".

6. In a letter of 13 October the complainant asked the Director-General to take a decision "in the first instance" on his home leave. In a letter of 5 November the Director-General replied that the decision he had asked for was already in the telex of 22 September. On 8 December 1988 the Director-General rejected his internal appeal on the grounds that he should have lodged it before 23 October 1988 and it was therefore irreceivable. That is the decision he impugns.

7. The telex of 22 September 1988 contained an administrative decision. The complainant was at pains to find out whether the Director-General had authorised it. But even if it was sent without authority it was still a decision: as the Tribunal held in Judgment 647 (in re Andres), provided a communication takes the form of a decision its lawfulness is immaterial for the purpose of lodging an appeal.

8. The appeal against the decision in the telex was therefore irreceivable, and so is this complaint, the internal means of redress not being exhausted. But the issue is entitled to reinstatement with full arrears of salary and allowances. The benefits he would have been entitled to but for dismissal included home leave for himself and his family in the period from 1 October 1988 to 30 September 1989. Though he himself was constrained by circumstances to take home leave in the one-month period the ESO imposed his family did not accompany him. Should they choose to travel at another time the cost of their home leave will be due to him by virtue of Judgment 996.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner