SIXTY-EIGHTH SESSION

In re ESPINOSA BLANCO (No. 2)

Judgment 1008

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. José Espinosa Blanco against the European Organization for Nuclear Research (CERN) on 25 April 1989, CERN's reply of 2 June, the complainant's rejoinder of 12 July and CERN's surrejoinder of 18 August 1989;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Article R IV 1.56 and Annex R A 10 of the CERN Staff Rules and 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 IV 1.56 of the CERN Staff Regulations reads: "On termination of appointment, indemnities or grants shall be paid at the rates ... shown in Annex R A 10". The annex prescribes, among other things, the payment of a "reinstallation indemnity" provided that on termination the staff member goes back to his home country.

The complainant, a Spanish citizen, left the service of CERN in Geneva on 31 August 1988 in the circumstances which are set out in Judgment 1007 under A. On 15 December 1988 he sent CERN a claim to the indemnity from Madrid, where he said he had taken up residence on 17 October. His personal effects were delivered to Madrid in February 1989.

In a letter of 10 March 1989 to the head of the Finance Division he demanded payment of the indemnity.

Having got no answer, he filed this complaint on 25 April. His former division wrote on 9 May asking him to claim the refund of his travel expenses. The Personnel Administrative Services Division sent him another letter on 18 May explaining that the indemnity would not be paid until he had claimed the travel expenses and asking him to do so at once on the appended form.

On 20 May he sent CERN the claim form filled up, and on 26 May CERN paid him the indemnity, which came to 46,910 Swiss francs.

B. The complainant observes that while he was awaiting payment the Swiss franc fell by a fifth of its value in terms of the peseta and he lost the interest.

He asks the Tribunal to declare that the indemnity was due as from 15 December 1988 or "another date". He seeks compensation for the decline in the value of the Swiss franc and for the loss of interest at the rate of 11.25 per cent a year from the date at which payment fell due.

C. CERN replies that the complaint is irreceivable. In its submission there were two conditions for payment of the indemnity to the complainant: that he should carry out his removal - which he did in February 1989 - and that he should claim the cost of travel to Madrid. Since it was waiting for him to meet the second condition he may not construe its silence until it sent reminders on 9 and 18 May as refusal of payment. Article VII(3) of the Tribunal's Statute does not apply. Since he did not go through the prescribed procedure within CERN, his complaint is irreceivable under Article VII(1) of the Statute.

Besides, it is devoid of merit. CERN may pay an indemnity only if the conditions for the grant of it have been met. The complainant did not meet the second condition until he made his claim to travel expenses in May 1989. There are no grounds for compensation for the change in the exchange rate: under CERN rules and the terms of the complainant's contract all payments are due in Swiss francs. No interest is due either because CERN paid the sum as soon as the complainant had met both conditions.

D. The complainant submits in his rejoinder, as to receivability, that he had no choice but to go to the Tribunal since he had awaited payment in vain for months.

As to the merits, he contends that the two conditions CERN relies on are not stated in Annex R A 10. In any event he satisfied the second condition long ago: CERN made out the "travel requisition" form for his journey to Madrid as early as 26 September 1988, even though, through no fault of his own, the head of his former division did not approve it until May 1989, just after the Organization had received the complaint. If CERN really thought he had not met the condition, why did it not send him a reminder immediately after he claimed the indemnity, in December 1988, or at least on getting his letter of 10 March 1989? It is in bad faith.

According to the rules payment of the indemnity is in two instalments: part on completion of the journey home, and the balance on completion of the removal. He founds his claim to damages on late payment: the delay being unwarranted and wilful, CERN is fully liable for the decline in the value of the Swiss franc and for the loss of interest during eight months as to part of the indemnity and during over three months as to the balance. He claims costs.

E. In its surrejoinder CERN maintains that the complaint is irreceivable for the reasons stated in its reply. It develops its arguments on the merits.

CONSIDERATIONS:

1. By virtue of Article VII(3) of the Statute of the Tribunal, where an organisation fails to take a decision upon any claim of an official within sixty days of the notification of the claim, he may have recourse to the Tribunal, and the period of ninety days prescribed in Article VII(2) for filing an appeal "shall run from the expiration of the sixty days allowed for the taking of the decision" by the organisation.

2. The text which the complainant cites as notifying his claim to the Organization is a letter he wrote to it on 10 March 1989.

Since he filed this complaint on 25 April he failed to wait for the expiry of the period of sixty days from the date at which the Organization received his letter of 10 March. His complaint is premature and therefore irreceivable.

3. The Organization contends that Article VII(3) does not apply and that his claim is irreceivable under Article VII(1), which provides that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

Where a complainant chooses to rely on Article VII(3) he must point to an implied decision. But there can be no implied decision in any period of less than sixty days. If there is no express final decision the complaint cannot be entertained under Article VII(1) either.

4. Besides, the subject of the complaint is the Organization's failure to pay the complainant reinstallation allowance. In fact it paid the full amount on 26 May 1989. His ancillary claims to compensation for a fall in value of the Swiss franc and to interest, which are therefore the only ones outstanding, did not appear in his letter of 10 March 1989 but were made for the first time in the course of his pleadings to the Tribunal. Not being based on a challenge to any decision at all, whether implied or express, they are irreceivable.

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.