Registry's translation, the French text alone being authoritative.

SEVENTY-THIRD SESSION

In re MERMIER

Judgment 1185

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Noël Mermier against the European Organization for Nuclear Research (CERN) on 30 September 1991, the Organization's reply of 18 December 1991, the complainant's rejoinder of 31 January 1992 and the Organization's surrejoinder of 15 April 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles R II 1.19 and R II 6.02 of the CERN Staff Regulations;

Having examined the written evidence and decided not to order oral proceedings, 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 was recruited by CERN in 1984 as an electricity technician in the SB Division at grade 5 under a three-year appointment. He got two extensions, the second of which expired on 31 January 1992. On 1 January 1986 he was transferred to the ST Division and in July 1986 was promoted to grade 6. In July 1988 he was granted a bonus for good service and in July 1990 was promoted to grade 7. On 25 July and 22 August 1990 his group leader and division leader recommended him for an indefinite appointment. On 22 October 1990 the Director-General told him that his case was held over to the next year.

In two communications dated 7 December 1990 the complainant refused to perform certain duties.

CERN's weekly news bulletin No. 10/91 of 4 March 1991 informed staff of the procedure for granting indefinite appointments. A final decision would come after review of each case by the official's division, then by the Personnel Division and lastly by an ad hoc Indefinite Appointment Review Board.

Also on 4 March the Administration informed the complainant that it had put him on a list of candidates for indefinite appointment but invited him, if he did not want to be considered, to say so. Since he did not reply the procedure went ahead. The upshot was a letter that the Leader of the Personnel Division wrote him on 9 July to say that he would not get an indefinite appointment nor an extension of appointment either. That letter, which amounted to notice under Article R II 6.02 of the Staff Regulations, is the decision he impugns.

By a letter of 18 July 1991 he applied to the Leader of the Division of Personnel for review but in a letter of 26 July he refused. By a letter of 6 August the complainant asked the Director-General to review the decision and to receive him. The Director-General replied on 15 August that there would be no review and that a meeting between them would serve no purpose.

B. The complainant submits that the decision of 9 July shows flaws.

Whereas under Article R II 6.02 of the Staff Regulations it is the Director-General who is empowered to decide whether to extend an appointment, the Leader of the Personnel Division, who took the impugned decision, had no authority to do so.

The review of his case was premature: according to paragraph 2 of Article R II 1.19 of the Staff Regulations and to CERN practice an indefinite appointment may not be granted to someone with less than nine years' service. His supervisors found his services satisfactory. Addressing a staff assembly on 17 December 1990, the Director-General promised that any staff who failed to get indefinite appointments because of some "defect" in their records would get extensions before their cases were reviewed. The complainant ought therefore at least to have had his

appointment extended.

CERN overlooked essential facts in the review of his case, namely the unbroken renewals of his contract and the promotions he got. It also misappraised the evidence.

His division leader's criticism of him stems from bias. Though his memoranda of 7 December 1990 were written in strong language they were not insulting. The "sanction" imposed on him was therefore out of proportion to the reasons for it.

He asks the Tribunal to set aside the impugned decision, order his reinstatement and grant him suitable compensation and costs.

C. In its reply CERN submits that the complaint is devoid of merit.

The decision under challenge was taken by the competent authority, the Leader of the Personnel Division, on the Director-General's instructions. It is a matter of good faith to treat as intra vires any staff management decision conveyed by the Leader of the Personnel Division.

Though fixed-term appointments are not ordinarily granted for more than nine years in all, CERN may consider someone for an indefinite appointment before his nine years are up. Besides, the complainant failed to answer its memorandum of 4 March 1991 giving him an opportunity to prevent the procedure from going ahead.

The Director-General's announcement of 17 December 1990 had nothing to do with the exercise for 1991, the one at issue in this case, and may not be treated anyway as making a promise.

The Organization did not overlook any essential fact. It reviewed the whole of the complainant's career according to the four criteria for awarding indefinite appointments and it found that he did not measure up in versatility, willingness to take on responsibility or team spirit.

CERN did not misappraise the evidence. His division leader's unfavourable recommendation squares with the opinions expressed in the review procedure. The other appraisals he cites are not as flattering as he makes out and since they were not made in the context of the review are immaterial.

Foreseeable effects of policy decisions that the member States of CERN took in 1990 are a larger workload and greater demands on staff. The review suggested that the complainant might fail to respond inasmuch as he had twice refused work assignments. Despite the gross breach of duty he suffered no disciplinary "sanction".

D. In his rejoinder the complainant presses his arguments and answers the Organization's.

The reason why he did not answer the memorandum of 4 March 1991 was that its real purpose was to let fixed-term staff who did not want extensions make their wishes known. He himself wanted to stay on, as CERN knew full well.

Citing Judgment 1151 (in re Girod and Peyret), he maintains that the impugned decision was ultra vires. In his case too there is "no obvious logical connection between the refusal to grant an indefinite appointment and the refusal to renew a fixed-term one". Besides, the explanation of the decision was only about the criteria for changing the sort of appointment he had, not about the non-renewal.

E. In its surrejoinder CERN maintains that his claims are groundless.

It points out that Judgment 1151 was about decisions made in 1990 in a context and according to a procedure which were not the same as in 1991. One criticism of the Tribunal's related to the Director-General's statement of 17 December 1990 and the ruling was that the competent authority had neither reviewed those cases nor taken the final decisions. In 1991 there was no comparable statement and the wording of the Director-General's letter of 15 August shows that he himself reviewed the complainant's records.

According to Article R II 1.19 of the Staff Regulations, when someone is considered for an indefinite appointment the result will be either the grant of such an appointment or termination of his fixed-term one.

CONSIDERATIONS:

1. The complainant joined the SB Division of CERN on 1 February 1984 as an electricity technician at grade 5. He was granted a fixed-term appointment for three years. He was transferred to the ST Division in 1986. He had his appointment extended on 23 July 1986 for three years and on 21 June 1989 for two and it was to expire on 31 January 1992.

A proposal was made on 25 July and 22 August 1990 for granting him an indefinite appointment. But there were many candidates for such appointments and the decisions to be taken were important; so on the recommendation of the Indefinite Appointment Review Board the Director-General informed him on 22 October 1990 that a decision on his case was held over until 1991.

The review of the complainant's case took from March to July 1991. By a letter of 9 July 1991 the Leader of the Personnel Division told him not only that he had been unsuccessful but that his fixed-term appointment would not be renewed on expiry.

That is the impugned decision, which, since no appeal lies under the CERN Staff Rules and Regulations against non-renewal of contract, is final and may be challenged directly before the Tribunal.

2. According to consistent precedent a decision to grant an appointment, even though it is a matter of discretion, may be set aside, and one flaw that will be fatal is that it was taken without authority.

That is one of the flaws the complainant is alleging.

According to the Staff Rules and Regulations the Director-General bears sole responsibility for individual decisions on the status of staff. That general rule covers appointment, refusal to grant an appointment and extension of a fixed-term appointment.

The impugned decision of 9 July 1991 was signed, not by the Director-General, but by the Leader of the Personnel Division.

Though not denying that, CERN submits that it was at the Director-General's instructions that the Leader of the Personnel Division notified the decision to the complainant; that a decision on personnel management notified by the Leader of the Personnel Division is as a matter of good faith to be deemed to have been taken by the competent authority; and that there was implied delegation to the Leader of the Personnel Division of authority to sign the decision.

Such a broad statement of principle is unsound. Delegation of authority to sign must as a rule be explicit. An executive head has the duty of delimiting what his subordinates may or may not do and he alone is answerable to the governing body of the organisation. He is not relieved of the duty of personnel management by vague phrases that purportedly empower heads of unit to act without supervision.

3. The want of proper delegation will not necessarily taint a decision signed ultra vires, the material issue being who actually took the decision. But there is no telling from the letter of 9 July 1991 who actually made the decision in this case. The text cites no delegation of authority to sign; the only reference to the decision is impersonal and raises no presumption whatever of such delegation.

4. In support of its contention that the impugned decision is lawful CERN cites as precedents the decisions it took granting and extending the complainant's appointment. In fact they defeat its own case.

Although the decisions granting and extending his appointment do bear the signature of the Leader of the Personnel Division, they expressly mention delegation of authority by the Director-General. Since the impugned decision of 9 July 1991 does not, no parallel may be drawn.

Moreover, the Director-General's letter of 22 October 1990 to the complainant says, as to the grant of an indefinite appointment in the context of the exercise for 1990: "I have now taken the decisions for this year". There is no evidence to suggest that in the complainant's case the Director-General himself took the decision not to grant an indefinite appointment.

5. The foregoing holds good only insofar as the impugned decision refuses an indefinite appointment since the Director-General has not said anything in particular about the other matter it deals with. But, as the Tribunal said in Judgment 1151, there is no obvious logical connection between the refusal to grant an indefinite appointment and the refusal to renew a fixed-term one. Indeed CERN has never given the complainant the reasons for non-renewal.

So there is no evidence to suggest that the decision was lawful as to non-renewal either.

6. For the foregoing reasons the Tribunal sets aside the impugned decision without taking up the complainant's other pleas.

The quashing of the decision entails referral to the Organization for review in line with what is said in this judgment.

The complainant was to leave CERN at the end of the last extension of his appointment, at 31 January 1992. Pending final settlement, therefore, the Organization shall make a provisional award of an amount equivalent to three months' remuneration, to be subtracted from the amounts that it will ultimately pay to him.

7. Since the complainant succeeds he is entitled to costs, which the Tribunal sets at 4,000 Swiss francs.

DECISION:

For the above reasons,

1. The decision of 9 July 1991 is set aside.

2. The case is sent back to the Organization for review of the complainant's claims in line with what is said in 6 above.

3. CERN shall make him a provisional payment of an amount equivalent to three months' remuneration.

4. It shall pay him 4,000 Swiss francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

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