

**SEVENTY-SEVENTH SESSION**

***In re* MANGEOT (No. 3)**

**Judgment 1375**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Bernard Mangeot against the European Organization for Nuclear Research (CERN) on 30 June 1993, CERN's reply of 17 September, the complainant's rejoinder of 2 November 1993 and the Organization's surrejoinder of 17 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Chapter II, Section 2, and Regulation R VI 1.11 of the CERN Staff Rules and Regulations and administrative circulars 10 and 26;

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's career at CERN is summed up under A in Judgments 1184 on his first complaint and 1290 on his second. In the first one he was challenging the Organization's refusal either of an indefinite appointment or of renewal of his fixed-term contract, and he succeeded. CERN thereupon granted him a seven-month extension to 28 February 1993, but since the Director-General refused further extension on its expiry he filed the second complaint. The Tribunal dismissed it in part. At the time of this dispute he was on "career path" V at grade 7, step 3.

Annual step increases are governed by Chapter II, Section 2, of the Staff Rules and Regulations and by administrative circular 26, which is entitled "Annual Interview, Advancement and Change of Career Path". Such an increase is granted on the strength of a written assessment of performance and an annual interview with the first-level supervisor, which ordinarily takes place by 31 March. The results of the procedure, which brings in both the staff member's division and the Personnel Division, are recorded in a form headed "Annual Interview and Advancement", which forms the basis of the Director-General's final decision.

In March and April 1992 the complainant was on leave of one kind or another and seldom at work. In a note of 4 May 1992 his group leader described his performance as unsatisfactory and recommended withholding the annual step increase he might have had. In an "Annual Interview and Advancement" form dated 15 May his supervisors said that since he had been often absent it had proved impossible to hold the annual interview and, with the agreement of the Leader of the Personnel Division, were recommending refusal of the increase.

By a letter of 29 June 1992 the Director of Administration notified the refusal to the complainant and by a letter of 27 August 1992 the complainant informed the Director-General that he was appealing against the decision.

By a letter of 26 February 1993 he asked his first-level supervisor for a copy of a memorandum the supervisor had written on 31 May 1991 assessing his performance as satisfactory. The supervisor refused in a letter of 5 March 1993 on the grounds that the memorandum was confidential. In a letter of 17 March to the Director-General the complainant again asked for the text and applied for referral to the Joint Advisory Appeals Board.

In a report of 8 March 1993 the Board recommended that the Director-General uphold the decision of 29 June 1992, but in a further report of 1 July 1993 recommended putting the text of the memorandum of 31 May 1991 in the complainant's file.

By a letter of 2 April 1993 - the impugned decision - the Director of Administration informed the complainant of the Director-General's decision not to grant the step increase and by a letter of 6 August 1993 sent him a copy of the memorandum of 31 May 1991 saying it would be put in his personal file.

B. The complainant contends first that the decision of 2 April 1993 was unlawful.

Under Regulation R VI 1.11 only the Director-General is authorised to take and notify decisions. Moreover, in a memorandum of 17 February 1992 setting the conditions for the delegation of his authority he rules out such delegation in the event of appeal against a decision by the Director of Administration. It was against just such a decision that the complainant lodged his internal appeal; so the letter of 2 April, being signed not by the Director-General but by the Director of Administration, was sent without authority.

In the complainant's submission the impugned decision also shows a mistake of law. In its report of 8 March 1993 the Joint Advisory Appeals Board said that although the complainant had been absent in March 1992 his division could still have "planned the annual interview"; that the decision of 29 June "rests on an item of evidence that was not appended to the interview form and which the complainant seems not to have had any knowledge of"; and that the Administration should "apply the rules more scrupulously". By discounting those remarks the Director-General overlooked essential facts.

The complainant utterly rejects the criticisms of his performance and submits that the Board failed to act impartially and so seriously infringed his rights.

The decision of 29 June 1992, too, was unlawful, and the one of 2 April 1993 confirmed it.

Citing the Board's report of 8 March 1993, the complainant submits that denying him the annual interview provided for in circular 26 was in breach of due process. That he was on leave did not warrant refusal of the step increase.

Nor did the Organization observe his right to a hearing. Although Annex I, point 1.2, of circular 26 says that "the performance of staff unavailable during the period of performance is appraised during their absence", his supervisors failed to fill up point 2a of the "Annual Interview and Evaluation" form and so deprived him of his right of reply.

The procedure shows several flaws. In particular it has no basis in any text the complainant is aware of.

The reasons for the decision of 29 June 1992 have not been stated.

Thirdly, the complainant submits that the two decisions he challenges overlooked essential facts. On 8 January 1991, when the increase was being considered, he had his appointment renewed for one year on the strength of a good performance report of 20 December 1990 from his group leader. Furthermore, administrative circular 10, which is about the "Personal Administrative File", says that supervisors' assessments are to be entered. By refusing to let him have the memorandum of 31 May 1991 in good time CERN was seriously at fault. Moreover, on 30 August 1991 his deputy group leader wrote another "glowing" appraisal of his performance.

He asks the Tribunal to quash the decisions of 2 April 1993 and 29 June 1992 and to order the Organization to grant him an annual step increase as from 1 July 1992, produce the performance appraisal of 31 May 1991 and pay him fair sums in material and moral damages and interest on the amounts due. He also seeks costs.

C. In its reply the Organization submits that the decision of 2 April 1993 did come from the Director-General and that all the Director of Administration did was pass it on to the complainant.

The decision shows no mistake of law. The complainant's division was the only one that had authority to set the date of an interview with him and rightly came to the view that he could not have the interview with his first-level supervisor in time. He has no right to see all the evidence relating to the procedure. Though staff do have the right to a hearing when their work is being assessed, the final decision to grant an annual step increase is at the supervisors' discretion.

The Organization made no mistake of fact in assessing him: in line with the rules it was his group leader who wrote the appraisal after looking at his file and consulting other members of the division.

His allegation that the decision of 29 June 1992 was unlawful is also unfounded.

CERN did state the reasons for the decision: they are set out in part 3 of the "Annual Interview and Advancement" form and are based on unfavourable assessments by the division as a whole, which run counter to his first-level supervisor's appraisal of 30 August 1991.

He may not rely on the assessment of 20 December 1990 since the period that counts for the step increase did not start until July 1991.

His application for disclosure of his first-level supervisor's memorandum of 31 May 1991 is irreceivable because there is no final decision on the matter. In any case, even though the memorandum does not cover the right period, the Organization has let him have the text.

D. In his rejoinder the complainant presses his pleas. He contends that the fact that there was no interview, for which he is not to blame, prevented him from having his say and so caused him serious injury.

He again submits that the author of the decision of 29 June 1992 acted ultra vires: the Organization offers no evidence of any exception to what the Director-General's memorandum of 17 February 1992 says.

CERN did overlook essential facts. He was not given the opportunity either to see any negative assessment of his work, or to comment on it in the "Annual Interview and Advancement" form before the decision-making process began. The note of 4 May 1992 should have been appended to the decision of 29 June 1992.

Point 22 of circular 26 says that "the first annual interview exercise shall be completed no later than 31 March 1992 and cover a period commencing 1 January 1991". So CERN should have taken account of the appraisals by his first-level supervisor in May and July 1991.

He admits to getting on 6 September 1993 the performance appraisal dated 31 May 1991. But since it is not signed he still has doubts about it and asks the Tribunal to order disclosure of a duly signed text.

E. In its surrejoinder the Organization points out that the complainant worked only six days in March 1992 and an interview therefore proved impossible.

It submits that the complainant was aware of the unfavourable appraisal of his work and that it did respect his right to a hearing.

His other pleas - particularly the one about the disclosure of the memorandum of 31 May 1991 - are groundless.

#### CONSIDERATIONS:

1. CERN employed the complainant from 1985 under a fixed-term appointment that it extended several times. The Leader of the Personnel Division informed him on 9 July 1991 that it would neither grant him an indefinite appointment nor renew his contract on its expiry on 31 July 1992. He challenged that decision in his first complaint. In Judgment 1184 of 15 July 1992, the Tribunal declared it ultra vires and set it aside and sent his case back to the Organization for review. On 31 July 1992 the Director-General extended his appointment by seven months to 28 February 1993.

2. On 27 August 1992 CERN rejected his request for a further extension. Having failed in an internal appeal, he filed a second complaint. The Tribunal dismissed it in the main in Judgment 1290 of 14 July 1993.

3. This dispute arises out of a decision the Director of Administration notified on 29 June 1993 to refuse him an annual step increase for 1991-92 on the grounds of poor performance. By a letter of 27 August 1992 he lodged an appeal with the Director-General against the decision. The Joint Advisory Appeals Board submitted recommendations to the Director-General on 8 March 1993. By a letter of 2 April 1993 the Director of Administration told the complainant that the Director-General had decided, in line with those recommendations, to reject his appeal. That is the decision he is impugning.

#### Authority to take the impugned decision

4. The complainant argues first that the official who signed the decision of 2 April 1993 was acting ultra vires. He is relying in the main on section 2.3 of the annex to the Director-General's memorandum of 17 February 1992 about delegation of authority. Under section 2.3 authority to sign is delegated to the Director of Administration for "All actions subsequent to appeals and mediation" save where the Director himself took the decision contested, in which case it is the Director-General who decides. The decision of 29 June 1992 refusing the annual step increase, against which the complainant appealed to the Director-General, bore the signature of the Director of

Administration. In the complainant's submission the Director-General himself must reply; yet it was the Director who signed the letter of 2 April 1993.

5. The want of proper delegation of the right to sign will not necessarily be fatal to a decision. What matters is the actual wording, and it may be necessary to refer to the evidence to determine who really took it.

6. The Director of Administration's letter of 2 April 1993 reads:

"The Joint Advisory Appeals Board to which your case was referred has submitted its recommendations to the Director-General. I enclose the text. The Director-General has decided to endorse them. On his behalf I hereby inform you that the decision you are challenging is upheld."

Those words bear out CERN's contention that the decision was indeed the Director-General's. It was he who received the Board's recommendations and endorsed them; all the Director did was to tell the complainant on the Director-General's behalf that the decision of 29 June 1992 was being upheld.

7. Besides, the evidence shows that the complainant did not himself regard the confirmatory decision as the Director's. A letter he wrote the Director on 6 April 1993 said: "I have received your registered letter of 2 April 1993 conveying the Director-General's decision to refuse me the annual step increase". And it appears he later held to that view: in his rejoinder, though he argues that the decision was ultra vires, he still refers to mere "notification" by the Director on 2 April 1993.

The merits

8. The Director-General has wide discretion in deciding whether to grant a step increase, especially when his decision rests on appraisal by the staff member's own supervisors. Because of their technical qualifications and familiarity with him and his work they are, after all, best fitted to advise. The Tribunal will nevertheless exercise a limited power of review and will set the decision aside, for example, if it is in breach of a procedural rule or overlooks an essential fact. Such are indeed the flaws that the complainant alleges in the impugned decision and that are, in his view, fatal.

9. His first plea is that the decision is in breach of procedural rules. The nub of his objection is that he was denied the annual interview prescribed in administrative circular 26 of November 1991.

10. Paragraph 5 of the circular says that "once each calendar year, every supervisor shall be required to have a formal interview with each staff member for whom he is responsible" and that "the interviews shall be completed by 31 March at the latest, and be conducted in line with the procedure and using the form provided in Annex I". Although section 1.2 of annex I says in the second paragraph that "the annual interview is held between the official and the direct supervisor", it adds in the third that "the performance of staff unavailable during the period of performance appraisal interviews is appraised during their absence". According to section 1.3 the interviews normally take place between 1 January and 31 March, each division drawing up its own detailed schedule. Section 2.2 requires one week's notice of the interview.

11. It is true that in this instance there was no annual interview. The complainant's supervisors explain that he was on leave until 20 April. The Board observed that he was "at work for only four days in the interview period" but his division "knew how little time there was in which to hold the interview and could have scheduled one".

12. Yet there is no reason to doubt the good faith of CERN's assertion that it could not hold an interview with the required one week's notice. So the complainant's plea about the missing interview fails.

13. He argues that CERN waited until 6 January 1993, when the appeal proceedings had already begun, to tell him what was wrong with his performance and why it was withholding the step. That was when it let him see his group leader's note of 4 May 1992, which, he submits, weighed heavily in taking the decision to withhold the step increase.

14. CERN retorts that it did not need to let him see that note while his performance was being assessed because it related to the decision on the grant of a step increase.

15. The Organization's argument is not convincing. In the second part of the report form the group leader says that

he is appending his proposal about grant of a step for 1991-92. So his proposal should have been forwarded at the same time as the form with the decision of 29 June 1992.

16. But the complainant was able to learn what his alleged shortcomings were when he appealed against the Director-General's decision of 29 June 1992. Indeed he admits that during the appeal proceedings he did in fact get the note on which the decision rests. So he may not allege any breach of due process.

17. Nor is there any merit to his plea that essential facts were overlooked. He sees such facts in his group leader's favourable assessment of 20 December 1990, a memorandum of support of 15 July 1991 written by his chief of section and "booster supervisors" and a testimonial dated 30 August 1991 from the deputy group leader. He makes much too of the memorandum of 31 May 1991 from the deputy group leader, which he saw only after making a formal application and on the Joint Advisory Appeals Board's recommendation of 1 July 1993.

18. But none of those items of evidence amounts to an essential fact. They all concern other matters - the procedure for the grant of an indefinite appointment or renewal of his fixed-term one - and relate to a different period, before 9 July 1991, when CERN refused the complainant an indefinite appointment and the renewal of his fixed-term appointment. This dispute is about its refusal of the step increase based on the assessment of his performance in 1991-92.

19. The appraisals by his supervisors, including the one of 4 May 1992 by his group leader, are about his performance since July 1991. Though they are strikingly different from the earlier good reports, the Director-General had discretion to rely on them and on no other text for the purpose of determining whether the step increase was due.

20. There being no need to entertain any of the complainant's other pleas, his claim to the quashing of the impugned decision fails, and so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas  
Mella Carroll  
E. Razafindralambo  
A.B. Gardner