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

NINETY-THIRD SESSION

Judgment No. 2162

The Administrative Tribunal,

Considering the complaint filed by Mr D. P. against the European Organization for Nuclear Research (CERN) on 1 June 2001 and corrected on 11 September, CERN's reply of 16 November 2001, the complainant's rejoinder of 21 February 2002 and the Organization's surrejoinder of 11 April 2002;

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. In August 1997, the complainant, an Italian national born in 1972, sent CERN an application form in which he indicated that he was interested in a post of technician in electronics and telecommunications. On 26 January 1998 CERN published a vacancy notice for a post of technician (electrical or electronics). The complainant was invited to participate in the selection procedure and was selected for the post. A three-year limited-duration contract as an electronics technician was offered to him on 9 July and he took up service on 1 September 1998.

In August 1999, the complainant's appointment was confirmed and, on 1 September 1999, he was granted an exceptional advancement of one step. His appraisal report for 2000 indicates that his performance was satisfactory, but that he seemed to be less interested in the maintenance part of his work. As this was extremely important, it was indicated that more effort on this part of his work would be appreciated.

With a view to the possible renewal of the complainant's contract, Mr M., his colleague and technical supervisor, drew up a detailed report on his performance. On 31 January 2001, Mr M. enumerated the considerations which had led him to propose that the complainant's contract should not be renewed. On 14 February the complainant received a written appraisal of his performance, signed by the Head of his Division, containing a proposal not to renew his contract beyond its expiry date of 31 August 2001. Reference was made in particular to his lack of initiative and perseverance in certain of his duties. The complainant submitted his comments on 22 February, together with his own version of the facts. In a letter of 26 February 2001, which is the impugned decision, the Director of Administration informed him that he had decided to accept the proposal not to renew his contract, particularly in view of his lack of interest in the maintenance work and his lack of initiative. The complainant received notification of this decision on 2 March 2001.

B. The complainant contends that the period of notice of six months laid down in Staff Regulation R II 6.02 for the notification of a decision not to renew a contract was not respected. As the expiry date of his contract was 31 August 2001, the decision, which was admittedly dated 26 February 2001, should have been notified to him by the end of February at the latest, but he received notification of it only on 2 March 2001.

Furthermore, the complainant contends that there were several substantive errors. In his view, the impugned decision is in clear contradiction with his appraisal reports for 1999 and 2000, and with the step increases awarded to him on 1 September 1999 and 1 July 2000, the latter step having been granted for "fully satisfactory performance". He adds that he has training in electronics and was recruited as an electronics technician. However, he has mainly worked as an electrical technician. He says that the impugned decision arose from the desire to get rid of him following an "error of recruitment". He adds that the real reason for the non-renewal of his contract is

related to the "animosity" of Mr M. In practice, none of the reasons put forward by the latter are corroborated by the evidence. One of the criticisms made of him, namely the failure to monitor a transformer, is even "false and completely fabricated".

The complainant also pleads procedural flaws. Even though he could legitimately expect that his contract would be renewed, he received no formal warning that there was a risk of it not being renewed if he did not improve his performance. No performance restoration plan was established in his case. The complainant also contends that his right to be heard was respected in appearance only, but not "materially". He says that the impugned decision was in practice taken during the first two weeks of January 2001, without giving him an opportunity to express his views. Furthermore, it only seemed that the non-renewal of his contract was decided upon by the competent bodies: the origins of the decision really lie in the document drawn up by Mr M. on 31 January 2001, which constituted "a veritable unilateral indictment".

Lastly, the complainant asserts that CERN made no effort to reassign him.

He requests the Tribunal to set aside the impugned decision and order CERN to pay compensation equivalent to three years' salary, allowances and pension contributions, less any earnings or unemployment benefit received by him. He claims compensation for moral injury, and costs.

C. In its reply CERN contends that the purpose of the period of notice applicable in the event of the non-renewal of a contract is to allow the staff member concerned to take all the necessary steps in view of termination of employment, and this was respected, even though he was informed of the notice of termination two days late. Furthermore, as he had participated in the performance appraisal procedure, he had been well aware since January 2001 that there was a risk that his contract might not be renewed. CERN recalls that a contract of limited duration expires at the end of the prescribed period.

With regard to the substantive flaws, CERN observes that the complainant has referred only to the initial phase of his employment, but has remained silent concerning the negative appraisals subsequently made of his performance. Moreover, he was recruited as an electronics technician with a view to being further trained in the specific functions of his post. He accepted the job and took up his duties knowingly, with the required basic training. Lastly, all the complainant's supervisors acknowledged that the non-renewal of his contract was justified. He failed to fulfil certain of his duties, including the monitoring of a transformer.

In relation to the procedural flaws, CERN submits that in March 2000, when his appraisal report was drawn up, the complainant received a first written warning, which had been preceded by several oral comments and was followed by many other warnings, both written and oral. His supervisors endeavoured to help him improve his performance, but subsequently had to admit that it was declining in quality. The complainant's right to be heard was not breached at any stage of the proceedings. The decision not to renew his contract was taken on 26 February 2001 on the basis of a formal proposal made on 14 February by the Head of his Division. He has no grounds for alleging that Mr M. had shown animosity towards him, since the latter had offered him assistance to facilitate his integration.

Lastly, CERN contends that the complainant has had occasion to avail himself of its services in his efforts to seek employment.

D. In his rejoinder, the complainant presses his pleas. He says CERN is mistaken in claiming that the specific nature of his duties was explained to him and that he signed his contract advisedly. He adds that it has seriously distorted the facts in endeavouring to claim that there was a progressive decline in his performance and by alleging that he received many warnings. Although it was indeed indicated in his appraisal report for 2000 that more effort would be appreciated in the maintenance part of his work, this cannot be construed as a written warning calling for him to improve, under threat of the non-renewal of his contract.

The complainant reiterates that throughout his employment Mr M. has shown animosity towards him. He denies that he offered to help him at any time.

Lastly, he challenges CERN's assertion that he should have expected the expiry of his appointment: such an argument is in contradiction with the very principle of a notice period.

E. In its surrejoinder, CERN maintains that the complainant's performance declined over time. It explains that, after giving him several oral warnings to no avail, his supervisors had to include a "special notice" in his appraisal report

for the year 2000. Despite this notice, which constituted the first written warning, he did not improve his performance. In CERN's view, the complainant has produced no proof that Mr M. showed animosity towards him.

CONSIDERATIONS

1. The complainant joined CERN on 1 September 1998 under a limited-duration contract for three years as an electronics technician.

His performance was found to be good during the probation period and he was accordingly granted an exceptional advancement of one step. In an appraisal report in 2000 his performance was also found satisfactory, apart from one reservation.

In a report of 31 January 2001 his colleague and technical supervisor, Mr M., proposed not renewing his appointment on its expiry, observing that he was neglectful and showed little interest in maintenance work. The report was sent to the complainant, whose reaction was one of surprise particularly as he had received no warning that his work was unsatisfactory.

CERN nevertheless told him by a letter of 26 February 2001 that his appointment would not be renewed. That decision, which is the one he is challenging, was notified to him on 2 March 2001.

He is asking the Tribunal to quash the impugned decision and to award him compensation equivalent to three years' salary, allowances and pension contributions, less any professional earnings or unemployment benefit. He also claims moral damages, and costs.

The Organization seeks dismissal of the complaint as unfounded.

2. The complainant's first plea is that CERN failed to give him six months' notice as Article R II 6.02 of the Staff Regulations requires. The decision not to renew his appointment was not notified to him until 2 March 2001, in other words six months minus two days before the date on which his appointment was due to expire, on 31 August 2001.

CERN does not demur but submits that the notice it gave the complainant was in keeping with the reasonable period required by the case law (see Judgments 1484, 1544, 1617 and 1983), particularly as he knew of its intent not to renew his contract.

The case law requires a minimum period of notice, but does not prevent an organisation from giving a staff member longer notice of separation. The minimum notice period laid down by CERN is beyond reproach and must be observed. It is not just an indicative date. Furthermore, a notice period starts to run only from the notification of the decision, not from the date on which the organisation indicates its intention.

But failure to observe the notice period does not invalidate a non-renewal decision as a whole. To fulfil the intent of the rule it is enough to quash the notice period alone and replace it with an admissible one. In Judgment 1617, the Tribunal observed, under 2, that the rule of contract law about implied renewal of an appointment does not apply in the international civil service, where contractual relations are determined by individual written decisions. Where a notice period ends after the expiry of a fixed-term contract, the notice requirement will be met if the contract is extended by the amount of time needed to make up the full period of notice.

That being so, the complainant's plea is not fatal to the decision of non-renewal as a whole. The latter must be set aside in part only and the complainant's appointment extended by two days at the Organization's expense.

3. The complainant puts forward a series of pleas which are either ill-founded or cannot stand individually.

(a) In his second and third pleas he accuses the Organization of impairing his rights by treating him inconsistently. Having praised his work for the first two years it suddenly found fault with it. Furthermore, it expected him to have the skills of an electrical technician, yet had recruited him as a technician in electronics (in the vacancy announcement the post was open to either), thereby making an error of recruitment.

According to CERN, it recruited him with the intent of training him for the job, but that proved impossible, particularly during the third year. Contrary to the complainant's assertion, training would certainly have enabled him to adapt to the requirements of the post. CERN therefore made no error in drawing up the incumbent's profile.

For performance to be rated differently from one reporting period to the next is not necessarily contradictory, one reason being that the staff member will be expected to improve as he gains experience in performing his duties. Nor will there necessarily be an error of recruitment if an employer requires a technician in electronics to do electrical work, to which he should be able to adapt.

(b) In his fifth plea the complainant submits that his right to a hearing was not "materially" observed. He further alleges that the decision not to renew his appointment was taken by his supervisors in January and February 2001, he was presented with a *fait accompli* and his subsequent explanations were disregarded.

CERN argues that the right to a hearing is purely formal in nature and, as such, was respected. It does not imply any obligation to act on the opinion of the person heard.

The right to a hearing does imply for an organisation the obligation to consider the positions of the parties to a dispute. In this case there is no proof that CERN failed in that duty, and it is common ground that the complainant did have his say.

(c) In his seventh plea the complainant maintains that the impugned decision was not based on sound reasons. The Organization demurs.

Like those in (a) and (b) above, this plea cannot stand on its own. The Tribunal will consider the arguments in its general discussion of the validity of the decision not to renew his appointment on grounds of unsatisfactory performance.

(d) The complainant's sixth plea is that the non-renewal was not decided by the competent authority. He alleges that the decision was in fact taken by Mr M., his colleague and technical supervisor, who in terms of rank was his equal, and that his supervisors' assent was purely formal. The Organization demurs.

The plea is without merit. The decision was undeniably taken by the competent body. It is quite usual - and reasonable - to regard the technical supervisor's opinion as particularly important in the assessment of a staff member's work. It does not mean in this case that the decision was taken by an incompetent body.

(e) The complainant's eighth plea is that CERN failed to help him to find another job, which CERN denies.

In view of how the complainant's case is to fare, it is superfluous to rule separately on what amounts to a subsidiary plea.

4. The complainant's fourth and main plea is breach of the rules governing non-renewal of appointment for unsatisfactory service. He submits that CERN owed him a duty of care. His appraisal reports for the first two years were good, arousing his expectations about the future. Prior to the decision, CERN gave him no clear warning that his performance was wanting and had to improve otherwise his appointment would not be renewed. When in January 2001 he did find out about his failings and the importance CERN attached to them, his supervisors had already decided that he was to go. What is more, the "plan for restoring performance" established in administrative circular No. 26 was not applied in his case.

The Organization retorts that it gave him ample warning, both orally and in writing, in particular in a comment in his appraisal report for 2000.

(a) Even for fixed-term contracts, the case law holds that an appointment must not be terminated for unsatisfactory performance unless the staff member has received a clear warning leaving him time to improve (see Judgments 1546, under 18, and 1583, under 6(a)). CERN has even devised a procedure to enable staff to overcome their professional failings.

(b) The case law specifies what a warning must consist of. It need not include an express threat of non-renewal; but the organisation's comments must be so worded as to leave the staff member in no doubt as to their seriousness and that failure to improve may incur non-renewal (see Judgment 1817, under 11(a), and the others cited therein).

In assessing performance it should also be borne in mind that when an organisation assigns a new duty to a staff member, particularly a probationer, it can be expected to afford appropriate training (see Judgment 1817, under 11(b)).

(c) If the staff member fails to improve despite adequate warning, the organisation may terminate his contract. In such cases the shortcomings need not be the same as those pointed out in the warning (see Judgment 1546, under 18).

5. Settlement of the issue at hand requires an objective examination of what the Organization deemed to be adequate warning.

CERN refers primarily to the comment in the appraisal report for the year 2000, in which he was given the rating "fully satisfactory performance", which earned him a step increase. However, after a positive evaluation of his work the reporting officer went on to say: "it seems that he is less interested in the maintenance part ... We therefore would appreciate more effort on this part of his work." Was this an attempt by CERN to warn him in "diplomatic" terms? If that was its intention - which is not certain - then in any event it did not use terms enabling the complainant to understand that he faced the possibility of non-renewal if he failed to remedy the shortcoming. He was the less likely to understand as, on the whole, the assessment of his work was very favourable. Furthermore, the evidence shows that at that stage CERN had done nothing about initiating the performance restoration procedure. It must therefore be inferred that the above-mentioned comment did not amount to an adequate warning.

CERN asserts that it informed the complainant of his failings several times, orally and in writing. The complainant denies ever receiving any warning. The burden is on the Organization to prove facts that it intends to cite in support of the non-renewal. The Tribunal is bound to note that CERN gave the complainant no warning or confirmation in writing. Nor has it provided any evidence of comments addressed to him orally. Again, and for the same reasons as stated above, the requirement of an adequate warning is not met.

The Organization also refers to the assessments of January and February 2001, sent to the complainant shortly afterwards for his comments, and the appraisal report for 2001. It must be noted that the complainant did not, at that time, acknowledge having received anything that might qualify as a warning. By then CERN was engaged in acting on the complainant's professional inadequacies, not in encouraging him to do better in the future: his supervisors had already shown their intention to end his appointment, without envisaging renewal if his work improved before his contract expired. In these circumstances, the remarks or observations made by CERN at the time cannot be regarded as a warning prior to non-renewal of an appointment for professional inadequacy.

The conclusion is that the non-renewal is not valid, or in any event CERN has failed to provide evidence allowing the Tribunal to conclude the contrary.

6. The complainant is not seeking reinstatement but only an award of compensation and of moral damages.

Where it proves impossible to set the impugned decision aside, Article VIII of its Statute allows the Tribunal to award the complainant compensation.

In setting the amount of the compensation, the following points need to be taken into account. The complainant could legitimately expect renewal of his appointment. If CERN felt that it ought to draw his attention to certain shortcomings it could, at least at first, renew his contract for less than three years to give him the chance and enough time to show improvement (see Judgment 1617, under 3(e)). His last appraisal report shows that, on the whole, the quality of his work was wanting.

In view of the foregoing and on the basis of the complainant's monthly salary, the Tribunal will award him *ex aequo et bono* 60,000 francs in compensation under all heads of injury.

7. Since the complaint largely succeeds he is entitled to costs.

DECISION

For the above reasons,

1. CERN shall pay the complainant 60,000 Swiss francs in damages and compensation for moral injury.

2. It shall also pay him 5,000 francs in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.