

NINETY-SEVENTH SESSION

Judgment No. 2337

The Administrative Tribunal,

Considering the complaint filed by Mr S. L. T. against the European Organization for Nuclear Research (CERN) on 5 June 2003 and corrected on 2 July, the Organization's reply of 8 October, the complainant's rejoinder of 12 December 2003 and CERN's surrejoinder of 16 February 2004;

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. The complainant is an Italian national born in 1963. On 22 August 1996 CERN issued a vacancy notice for a post of mechanical engineer, for which the complainant applied. His application was successful and he was offered a three year fixed term contract starting on 1 November 1997, in which it was stated that:

“This [...] contract [...] may be renewed or extended up to a maximum total period of 6 years. A fixed term contract may lead to the award of an indefinite contract.”

In June 2000, the complainant's contract was renewed until 31 October 2003.

In a letter dated 25 April 2002, the Human Resources Coordinator informed the complainant that he would be considered for the award of an indefinite contract. On 1 November the Long-Term Contract Board (LTCB) recommended not awarding an indefinite contract to the complainant on the grounds that two of the five criteria stipulated in paragraph 17 of Administrative Circular No. 9 (Rev. 2), on the basis of which such contracts were awarded, were not fully met. The complainant subsequently formulated his own comments. They were referred to the Board, which, however, maintained its recommendation on 24 February 2003.

In a letter of 5 March, which constitutes the impugned decision, the Director of Administration, on behalf of the Director General, informed the complainant that he had come to the conclusion that the recommendation was justified and that he had therefore decided not to award him an indefinite contract. On 31 March 2003 the complainant was authorised to appeal directly to the Tribunal.

B. The complainant begins by pleading several procedural flaws. He alleges that the LTCB completed its initial review on the basis of an incomplete file, showed a lack of impartiality and did not allow him a hearing. He adds that the impugned decision was not preceded by a warning. In support of his arguments, he submits that, since 1998, no doubts had been raised regarding the quality of his work in his various appraisal reports, that his group leader and his division leader had recommended the award of an indefinite contract and that he had “regularly and sometimes exceptionally” been awarded steps.

The complainant also contends that the impugned decision is not based on any valid reasons. The “facts” referred to by the LTCB did not reflect the true situation and completely contradicted the appraisals carried out between 1998 and 2002, which showed the complainant's performance to be “satisfactory and sometimes even exceptional”.

The complainant further maintains that CERN violated the principle of good faith in considering that the criteria laid down in paragraph 17 of Administrative Circular No. 9 (Rev. 2), which also apply to renewals of fixed term contracts, had been met in 2000 when his contract had been renewed, but were no longer met in 2003 for the purpose of awarding him an indefinite contract.

Lastly, the complainant deduces from the above arguments that the Organization was guilty of abuse of authority. He accuses it of aiming to overcome its financial difficulties by reducing staff, instead of complying with the Staff Rules and Regulations and the general principles of law.

The complainant requests that the Tribunal set aside the impugned decision, award him the sum of 1,974,411 Swiss francs in respect of material damages, a further sum for moral injury, and costs.

C. In its reply CERN recalls that indefinite contracts are not awarded automatically but are subject to an assessment drawn up on the basis of the above mentioned five criteria. It also points out that, according to its case law, the Tribunal in the present case can exercise only a limited power of review. It considers, furthermore, that it acted in conformity with the general principles laid down by the Tribunal concerning the award of indefinite contracts.

The Organization denies each of the alleged procedural flaws and maintains that the complainant's file received "scrupulous attention". It also points out that an interview with the staff member concerned is not required for the award of an indefinite contract. The complainant cannot maintain that he was unaware that his performance was not fully satisfactory, since in the 2000 appraisal his supervisor had already identified a considerable number of "unsatisfactory areas". CERN adds that the fact that annual appraisal reports are favourable does not imply that a staff member is able to meet the Organization's long term requirements and is therefore a suitable candidate for an indefinite contract.

The defendant also points out that it cannot be argued that the conclusions reached by the LTCB did not reflect the true situation merely because they differed from the complainant's annual appraisals.

CERN lastly rejects the complainant's pleas concerning breach of the principle of good faith and abuse of authority, and maintains that his arguments based on an alleged staff reduction policy are "purely imaginary".

D. In his rejoinder the complainant reiterates all his pleas. He adds that Administrative Circular No. 9 (Rev. 2) does not stipulate that the LTCB must be consulted for the award of an indefinite contract. As part of transitional measures applied from 1 January 2000 to 31 December 2002, however, the Director General had decided that the Board should be consulted. But since the impugned decision was dated 5 March 2003, the complainant considers that the Board's involvement in the decision was unlawful and that only the favourable recommendation of his division leader should be taken into consideration. The complainant further alleges that the Board failed to abide by its own rules of procedure.

E. In its surrejoinder the defendant maintains its position. It states that in the letter dated 25 April 2002 the complainant was informed of the rules of procedure applying to the award of indefinite contracts, and hence of the fact that the LTCB would be consulted, and he raised no objection in that respect, either at that time or subsequently. According to CERN, the complainant has failed to prove that there was any breach of the Board's rules of procedure.

CONSIDERATIONS

1. Whilst working at CERN under a three-year fixed-term contract, the complainant was informed, in a letter of 25 April 2002 from the Human Resources Co-ordinator, that he would be considered for the award of an indefinite contract. His division leader expressed a favourable opinion. On 1 November 2002 the Long Term Contract Board (LTCB) recommended not awarding an indefinite contract to the complainant on the grounds that two of the criteria defined in paragraph 17 of Administrative Circular No. 9 (Rev. 2), which sets out the conditions governing the award of such contracts, were not fully met. The complainant wrote down comments which on 16 December 2002 were submitted to the Board, and the latter, having considered them and examined the case again, decided on 24 February 2003 to maintain its recommendation.

2. According to consistent precedent, an organisation's decisions concerning the recruitment of a staff member, the termination of his appointment or the non renewal of a contract are left to the discretion of the appointing authority, in this case the Director-General, and are subject only to limited review by the Tribunal. The latter can set aside a decision only if it was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was an obviously wrong inference from the

evidence or misuse of authority (see Judgments 1349, 1450 and 1696).

3. The complainant refers to several procedural flaws. He alleges that the file submitted to the LTCB was incomplete, that the Board showed a lack of impartiality and that it did not allow him a hearing.

(a) The complainant contends that, when the LTCB first reviewed his case, the file was incomplete because his curriculum vitae was missing. However, the Organization rightly points out that the complainant forwarded this document to the LTCB before it carried out its second review, which the complainant does not deny. This document did therefore appear in the file when the Board issued its second recommendation.

The fact that the curriculum vitae was missing when the Board first reviewed the case must anyway be attributed to the complainant, since he had been asked to produce such a document by the Human Resources Co-ordinator in a letter of 25 April 2002.

The plea is therefore not supported by the facts.

(b) The complainant alleges that the LTCB showed a lack of impartiality on the grounds, in particular, that the Board's Secretary, the member representing the Human Resources Division, gathered the opinions of at least some of the staff members who were consulted at the time the Board conducted its first review. He adds that the Secretary not only drafted the Board's first review report, but was also a member of a body responsible for proposing a strategy enabling CERN to achieve savings by cutting back on staff in the category to which he belonged. Moreover, on behalf of the Human Resources Division Leader, the Secretary signed the memorandum forwarding the LTCB's conclusions to the Director of Administration.

An advisory body must of course be impartial. There is no indication on file that the disputed decision is at all attributable to a desire to cut back on staff rather than to the strict application of the criteria governing the award of indefinite contracts. The submission of the LTCB's conclusions to the Director of Administration was a normal course of action under the existing guidelines, since in the last resort it was up to the Director General, or his representative, to take a decision in view of the difference of opinion between the complainant's supervisor and the LTCB. Furthermore, the secretarial work of the Board formed part of the duties of the representative of the Human Resources Division. Similarly, it lay within the scope of the duties of the Board members to make enquiries about the complainant.

The complainant's remarks do not lead to the conclusion that either the representative of the Human Resources Division on the Board, or the Board itself, or its reports lacked impartiality.

(c) There is no general rule whereby an advisory body must invariably interview a staff member. In the case in hand, while paragraph 13.3 of Administrative Circular No. 2 (Rev. 1), dealing with recruitment, provides that "the assessment of candidates by members of the Selection Board constitutes the main though not the only selection tool", paragraph 14.3 specifies that the methods available to the LTCB are the same as those of the selection boards, but does not require systematic interviewing of staff members, which is quite understandable in the case of candidates for indefinite contracts already working for CERN and therefore known by their colleagues. Moreover, according to the LTCB's terms of reference, the Board establishes its own working procedures, which means it is free to decide whether or not to interview a candidate.

The plea therefore likewise fails.

4. In his rejoinder the complainant notes that the impugned decision was issued in 2003, whereas the LTCB's involvement was decided by the Director General only as part of transitional measures applicable from 1 January 2000 to 31 December 2002. The complainant appears to draw the conclusion that all the LTCB's activity subsequent to 31 December 2002 must therefore have been deprived of any legal basis.

It is worth recalling that on 25 April 2002 the Human Resources Co-ordinator informed the complainant that he would be considered for an indefinite contract and explained the procedure. It was on that basis that the procedure was initiated and subsequently conducted. The complainant's case was examined in 2002 and the procedure lasted beyond 31 December of that year. At the time, neither the Organization nor the complainant queried the LTCB's authority to conduct a further review, even if it was to extend beyond 31 December 2002. In the absence of any indication to the contrary by the parties, it therefore appears reasonable to consider that the Board's further review formed part of the procedure started in 2002 and was subject to the rules applicable at that time.

5. The complainant refers to case law according to which the non-renewal of a fixed-term contract for unsatisfactory service should be preceded by a warning which would give the staff member a chance to improve his performance (see Judgment 2162 and the case law referred to). He argues that this case law should also apply to the decision not to award an indefinite contract.

It may be noted, however, firstly that the complainant had in fact been warned, and secondly that his position in law is different.

The case law cited refers to the situation of a staff member who, failing any indication to the contrary, can rely on the continuation of his contractual relations (either not terminated or renewed), since according to the rules of good faith the Organization should warn the staff member if it considers his performance unsatisfactory in order to give him a chance to improve. The situation is different if an organisation, like CERN, restricts the number of fixed term contracts a staff member may be given and lays down specific conditions for the award of an indefinite contract. In this case, the staff member cannot sit back and wait for his contract to be turned into an indefinite contract, since he will be expected to meet stricter requirements. Of course, the Organization is not on that account relieved of its duty of care towards the staff member, and, in accordance with the rules of good faith, it must warn him either if it is convinced that he is simply incapable of performing the duties attached to an indefinite contract, or if it believes that, in order to perform them the staff member must improve the quality of his work still further. This is an obligation the Organization must fulfil particularly in the context of periodic performance appraisals.

In this case, the Organization let the complainant know on several occasions, and certainly in 2000, that he did not meet all the requirements for the award of a longer term contract. The LTCB, moreover, confirmed the shortcomings which had been observed previously.

This does not contradict the positive appraisals issued during the complainant's contract and the resulting regular increases in his salary. Those appraisals were made in respect of the complainant's performance as a fixed term contract holder and were in no way related to the issue of whether he satisfied the criteria required for the award of an indefinite contract.

The plea therefore fails.

6. The complainant further contends that the Organization violated the rules of good faith by not awarding him an indefinite contract, even though it considered his performance satisfactory.

The complainant should not interpret positive appraisals and salary increases as an implicit promise to award him an indefinite contract. He knew that reservations had been expressed on previous occasions and he was certainly aware that the award of an indefinite contract was subject to more stringent requirements, that his case would be submitted for ad hoc review and that the opinion of his division leader would not necessarily be endorsed, since the decision lay at the discretion of the Director-General.

The plea therefore fails.

7. The complainant also contends that in taking the impugned decision, even in pursuit of a policy of staff reductions, the Organization nevertheless was guilty of abuse of authority.

The burden of proving abuse of authority rests on the party pleading it.

Independently of the fact that budgetary considerations may have repercussions on staffing levels and on an organisation's recruitment policy, there is no reason to believe that in this case such considerations played a part and led to a breach of the rules governing the award of indefinite contracts.

These rules are designed to enable CERN to recruit highly qualified staff. That is a perfectly legitimate goal and there is nothing to show that the impugned decision did not serve that purpose.

Furthermore, the complainant's plea appears contradicted by his allegation that the Organization had taken steps to replace him.

In the circumstances, there is no reason to consider that the plea is founded.

8. Lastly, the complainant alleges that the impugned decision is not based on a valid reason.

Paragraph 17 of Administrative Circular No. 9 (Rev. 2), entitled “Criteria for contract renewals or extensions on a fixed term contract and for the award of an indefinite contract”, reads as follows:

“The staff member concerned must have clearly demonstrated that he satisfies the exigencies of his functions to date and possesses the profile and aptitudes for further satisfactory progress in his current assignment or in other domains as required for the fulfillment of the Organization’s mission. The assessment within the contract review process is guided by elements relative to:

- a) Ability in successfully applying professional qualifications, knowledge, experience and skills in work, with a proven record of achievement.
- b) Capacity and willingness to develop and use abilities to serve the interests of the Organization and to accept and adapt to different assignments and situations.
- c) Initiative, willingness to assume responsibility as well as capacity to work independently as necessary.
- d) Ability to integrate into the work environment and into the Organization as a whole, and to work effectively as a member of a team.
- e) A proven satisfactory record of communication skills at all relevant levels, conduct and relations at work.”

It appears from the proposal of the complainant’s division leader that, having made many efforts and improved his performance, the complainant met the above criteria in 2002.

The LTCB, on the other hand, considered unanimously in its first report of 1 November 2002 that, whatever the complainant’s qualities might be, he failed to meet criteria a) and c).

After examining the complainant’s comments, the Board proceeded, at a plenary meeting on 7 January 2003, to conduct a further review. This gave rise to a five-page reasoned report dated 24 February 2003, confirming its recommendation. The Board took the view that, although the complainant’s performance was considered by his supervisors to be satisfactory in the limited context of his current assignment, it did not meet the more stringent requirements for long-term employment.

It is therefore on the basis of his performance and his inability to perform the duties expected of an indefinite contract holder that the complainant was not awarded such a contract. As indicated under 2 above, however, in such circumstances the Tribunal has only a limited power of review.

CERN has established a procedure to ensure that, in the event of a difference of opinion, the decision to award an indefinite contract is subject to a very extensive review, involving all parties, by persons considered to be fully qualified for that purpose, in order to avoid the possibility of an arbitrary act.

The impugned decision in this case was taken after such a procedure and after thorough examination of the complainant’s case.

Since the procedure and the decision concerned are not flawed, the Tribunal must uphold the choice resulting from the exercise by the Organization of its discretionary authority.

This plea also fails.

9. The complaint must therefore be dismissed under all heads.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.