NINETY-SEVENTH SESSION

Judgment No. 2349

The Administrative Tribunal,

Considering the complaint filed by Mr I. R. C. against the European Organization for Nuclear Research (CERN) on 11 March 2003 and corrected on 17 April, the Organization's reply of 21 July, the complainant's rejoinder of 26 August and CERN's surrejoinder of 3 November 2003;

Considering Articles II, paragraph 5, and VII 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, a British national born in 1963, joined CERN in 1995 as a physicist under a three-year "term contract" (now referred to by CERN as a "limited duration contract"), which was renewed in October 1998 for a further period of three years. In January 2001 he was notified by the Director of Administration that his appointment would expire on 30 September 2001, as stipulated in his contract.

In April 2001 the complainant applied for a post in the Vacuum Group of the Large Hadron Collider Division (LHC-VAC). This post was offered as a fixed-term contract convertible into an indefinite contract. The qualification requirements listed in the vacancy notice included a "willingness to carry out supervisory functions" and an "ability to make significant medium to long-term contributions to the Organization beyond the scope of the initial functions".

CERN's recruitment procedure for appointments of this type involves separate assessments by the Selection Board and by the Long Term Contract Board (LTCB). In this case, the Selection Board recommended that the complainant be appointed to the post, but the LTCB expressed reservations. In view of those reservations, the Organization decided to postpone recruitment for the vacancy and to extend the complainant's contract for a period of 18 months, during which the Selection Board would reassess his performance and his ability to fulfil the long term requirements of the post. To that end, at a meeting held on 14 August 2001, the Organization informed the complainant of the specific reservations expressed by the LTCB and defined a set of objectives which he was to achieve during the extension of his contract.

A status report dated 11 June 2002 drafted by the complainant's supervisors mentioned certain communication problems between the complainant and his colleagues as well as criticism from his subordinates regarding the definition of their tasks. In August 2002 the Chairman of the Selection Board sent a memorandum to the Human Resources Division Leader stating that the objectives given to the complainant were mostly satisfied, but that in view of certain "difficulties relative to leadership abilities, which the post calls for", neither the Selection Board nor LHC Division management felt that they could recommend the complainant for the LHC-VAC vacancy.

By a letter of 13 September 2002 the Human Resources Coordinator informed the complainant that he would not be appointed to the post, explaining that he did not fully match the profile described in the vacancy notice, especially with regard to the supervisory functions. The following week, the LHC Division Leader sent him a memorandum notifying him that he was proposing not to extend his appointment, which was due to expire on 31 March 2003. He attached a copy of an assessment on which that proposal was based. In accordance with the Staff Regulations, the complainant was invited to submit comments, which he did on 25 September 2002. By a letter of 26 September 2002, the Director of Administration informed the complainant that, after having considered the latter's comments, the LHC Division Leader had decided to maintain the decision not to extend his appointment.

On 12 October 2002 the complainant submitted a request to the Director General for review, with mediation, of the decision not to appoint him to the vacancy. In his report dated 19 November 2002, the mediator concluded that the complainant's profile was not fully compatible with the job description for the post and that he had been "given ample opportunities, but failed to fulfil all the requested criteria". On 12 December 2002 the Director of Administration wrote to inform the complainant that, having studied all the elements pertaining to his case, including the mediator's report, he had decided on behalf of the Director General that the decision not to appoint him should be maintained. That is the impugned decision.

At the end of 2002, the complainant also complained to the Organization's Equal Opportunities Advisory Panel that he had been a victim of mobbing during the recruitment process for the vacancy. However, the Panel reported on 17 April 2003 that although there was evidence of a certain resistance against the complainant and that his subordinates had bypassed him in the line of authority, these events could not be interpreted as mobbing within the meaning of the applicable provisions.

B. The complainant's first plea is that he received no warnings regarding his "supposed bad performance leading to his dismissal from the Organization". He considers that if the main reason for the decision not to appoint him to the vacancy was his performance as a supervisor, then he ought to have been warned of that earlier. His 2001 performance appraisal indicated, on the contrary, that "the supervision part of his activity [...] was also satisfactory", whilst the objectives he was to achieve during the extension of his contract did not reflect any doubts as to his managerial abilities.

Secondly, the complainant submits that he received no assistance from his supervisor in overcoming the difficulties that had been identified. He asserts that his supervisor undermined his authority and failed to clarify his activities and priorities or those of his subordinates.

Thirdly, he submits that his expectations for obtaining a fixed term contract were raised following the interview with the Selection Board. He was told that the vacancy would remain open pending a further appraisal of his performance. Since he achieved the objectives defined to address the reservations expressed by the LTCB, he considers that he ought to have been recruited for the LHC-VAC vacancy.

Fourthly, the complainant argues that he was given "no clear indication as to the reasons leading to his contract termination", because the LTCB did not issue a written report stating its reservations. This, he submits, deprived him of the right to reply and prevented him from knowing what aspects of his performance needed to be improved.

Lastly, he contends that the Human Resources Division Leader failed to comply with the procedure governing review with mediation. According to Administrative Circular No. 6 (Rev. 1), copies of the mediator's report are to be forwarded by the leader of Personnel Division to the member of personnel concerned and to the Director of Administration. However, the complainant received the mediator's report from the Director of Administration, and he considers that this casts doubt on the conclusions of the report.

The complainant claims "reinstatement" in the post for which he had applied, or in a similar post; damages for moral, professional and material injury; and costs.

C. The Organization submits that the complaint is irreceivable for failure to exhaust the internal remedies. It considers that the impugned decision of 12 December 2002, taken upon completion of the review with mediation procedure, was a new decision which, though identical in substance, replaced the previous decision not to appoint the complainant to the LHC VAC vacancy. Consequently, the complainant ought to have lodged an internal appeal against the decision of 12 December 2002 within the applicable time limit. Since he failed to do so, no final decision was taken, and his complaint is therefore irreceivable under CERN's Staff Rules as well as Article VII(1) of the Statute of the Tribunal.

On a subsidiary basis, the Organization submits that the complaint is unfounded. In its preliminary observations on the merits, it draws attention to the fact that many of the complainant's arguments concern not the impugned decision but the decision not to renew his limited duration contract. Although the complainant could have challenged the latter decision by means of a direct appeal to the Tribunal, he failed to do so. Referring to the case law, CERN also emphasises the discretionary nature of appointment decisions and the Tribunal's limited power to review them.

Addressing the complainant's specific pleas, the defendant denies that he was given no warning of his managerial shortcomings. At the time of his application, the complainant had only recently taken on significant supervisory duties, as shown by his 2001 performance appraisal report. The reservations expressed by the LTCB were explained to him in detail during the meeting of 14 August 2001. At that same meeting, communication difficulties were also brought to his attention. His 2002 performance appraisal report confirmed that difficulties remained.

Regarding the allegation that the complainant received no assistance from his supervisor, the Organization replies that he was given clear work objectives both in his performance appraisal report and for the extension of his contract, as noted by the mediator.

CERN expresses surprise at the complainant's assertion that he achieved the objectives defined for him, given that both the status report of 11 June 2002 and his 2002 performance appraisal report stated that difficulties remained and thus indicated that the objectives were only partially met. It notes that the mediator's report confirmed that view.

Rejecting the allegation that he received no clear indication of the reservations expressed by the LTCB, the Organization submits that the meeting of 14 August 2001 was held precisely for the purpose of explaining those reservations to him and defining objectives accordingly.

CERN admits that a "slight deviation from the normal procedure" occurred in that the mediator's report was sent to the complainant by the Director of Administration. However, according to the defendant, that aspect of the procedure is merely intended to ensure that a copy of the report is received by the staff member concerned, and the identity of the sender is not essential.

D. In his rejoinder the complainant maintains his arguments on the merits. On the issue of receivability, he contends that CERN's interpretation of the provisions governing internal appeals is incorrect. Although Administrative Circular No. 6 (Rev. 1) provides the option of appealing internally against the decision taken at the end of the review with mediation procedure, that is not a mandatory procedural step, and it is possible to appeal directly to the Tribunal at that stage. He adds that the mediator in his case now represents CERN on the Joint Advisory Appeals Board, so that an internal appeal would inevitably produce the same result as the review procedure.

He asserts that the Organization suspended the recruitment process, not in order to give him another chance to fulfil the requirements of the post, but because in the light of his performance record, and given that there was a vacant post for which he was clearly suitable, it had no evidence at that time to support a decision not to appoint him to the post.

Modifying his claims, the complainant asks to be awarded six years' net salary in the event that he cannot be appointed to the LHC-VAC vacancy or to a similar post.

E. In its surrejoinder the Organization maintains its objection to receivability. It asserts that the provisions governing the review procedure provide that if a member of staff is not satisfied with the decision taken at the end of the review procedure, the next step is to lodge an internal appeal. It adds that the mediator in question would obviously not have participated in the Appeals Board in his case.

CERN also maintains its subsidiary arguments on the merits. Replying to the complainant's allegation concerning the postponement of the recruitment process, the Organization observes that he is criticising an arrangement which was designed solely to protect his career opportunities.

CONSIDERATIONS

1. The complainant challenges CERN's decision not to appoint him under a fixed-term contract to a vacant post in LHC-VAC.

2. The Organization maintains in the first place that the complaint, filed on 11 March 2003, is irreceivable. The following are the relevant provisions:

Article R VI 1.01 of the Staff Regulations

“The review procedure may be initiated by a member of the personnel prior to lodging an internal appeal. The person concerned may call upon a mediator within this procedure. At the conclusion of the procedure, the Director-General shall take a new decision which shall cancel and replace the initial decision and which may be subject to internal appeal. The Director-General shall lay down the conditions of the review procedure.”

Article VI 1.03(b) of the Staff Rules

“[A decision may be challenged by a member of the personnel] by filing a complaint with the Administrative Tribunal of the International Labour Organization when the decision is final, i.e. it cannot be challenged within the Organization or after internal procedures have been exhausted.”

Administrative Circular No. 6 (Rev. 1)

“1. In accordance with Article VI 1.03 of the Staff Rules, a decision may be challenged within the Organization, either through the review procedure, or directly through the internal appeal procedure. Pursuant to Article R VI 1.01 of the Staff Regulations, the aim of this administrative circular is to set out the conditions of the review procedure.

[…]

17. The leader of Personnel Division shall forward copies of the mediator’s report to the member of the personnel concerned and to the Director of Administration.

[…]

21. The new decision may not be reviewed a second time. However, an internal appeal against it may be lodged within 60 days following notification.”

3. The complainant alleges that the procedure governing review with mediation was not followed by the Human Resources Division Leader. Paragraph 17 of Administrative Circular No. 6 (Rev. 1) specifies that “the leader of Personnel Division shall forward copies of the mediator’s report to the member of the personnel concerned and to the Director of Administration”. However, on 12 December 2002 the complainant received the mediator’s report from the Director of Administration, along with a letter stating that the decision not to appoint him to the vacant post was maintained. The complainant submits that the mediator’s conclusions should be questioned as a result of this breach in procedure.

4. The complainant requests that he be “reinstated” in the fixed term post for which he had applied or a similar post, and he claims compensation for moral, professional and material injury, and costs.

5. The complaint is irreceivable, since the complainant has failed to exhaust the internal means of redress available to him in relation to the subject matter of the complaint. On 12 December 2002, upon completion of the review with mediation procedure, CERN communicated to the complainant a decision, which, although identical in substance, replaced its previous decision not to appoint him to the post. Thus, the impugned decision is a new decision. In order to contest this decision, the complainant should have lodged an internal appeal against it within 60 days following 12 December 2002.

6. In filing his complaint without first having lodged an internal appeal within the applicable deadlines, the complainant has failed to comply with Article VI 1.03 of the CERN Staff Rules as well as with Article VII of the Statute of the Tribunal.

7. The complainant argues that his complaint is receivable, pursuant to paragraph 21 of Administrative Circular No. 6 (Rev. 1). He says that this paragraph does not imply that an internal appeal must be launched; rather, it specifies that an internal appeal is an optional procedure and is not mandatory. Thus, since the complainant has already completed a review with mediation, he has exhausted all internal means of redress and is permitted to apply directly to the Tribunal. The complainant notes that paragraph 1 of Administrative Circular No. 6 (Rev. 1) provides further support for this interpretation, as it states: “[...] a decision may be challenged within the Organization, either through the review procedure, or directly through the internal appeal procedure”. As well, section 3 of the annex to the above mentioned circular, entitled “Procedure before the ILOAT”, states: “[t]his procedure is generally initiated after the means of internal appeal described above have been exhausted (request for

review and/or a simple internal appeal), unless the Director-General authorizes the member of the personnel concerned to refer the case directly to the [Tribunal]".

8. Additionally, the mediator who was involved in the review procedure is also a member of the Joint Advisory Appeals Board; thus, it is the complainant's position that an internal appeal would be futile as he could not obtain an impartial hearing.

9. There is no merit to any of these arguments. If the complaint itself is irreceivable, as it is, defects in the mediation procedure leading up to the making of the impugned decision are simply irrelevant, as the decision itself, not having been properly challenged, is final and beyond review. The quoted portions of the applicable rules are internally consistent and do not want for clarity. There is, of course, no obligation on any complainant to launch an internal appeal, since he or she may always decide to accept the decision which follows the mediator's report. The use of the word "may" in paragraph 1 of Administrative Circular No. 6 (Rev. 1) is therefore entirely appropriate. The fact that an internal appeal is a necessary pre-condition to bringing a complaint before the Tribunal does nothing to diminish the wholly voluntary character of both the internal appeal itself and the recourse to the Tribunal. Where the review procedure with mediation is chosen, it results in an entirely new decision and this latter decision is the only one which can be appealed internally and then to the Tribunal. Lastly, the suggestion that the complainant might not have had a fair hearing before the Joint Advisory Appeals Board, besides being purely speculative (who is to say that the mediator would have sat on the panel hearing the appeal or would not have been successfully objected to?), is simply irrelevant since a subsequent appeal to the Tribunal would have afforded full opportunity to the complainant to have the proceedings set aside on this ground alone. The complaint being irreceivable, it must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

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