

NINETY-EIGHTH SESSION

Judgment No. 2375

The Administrative Tribunal,

Considering the complaint filed by Mr S. A. against the European Organization for Nuclear Research (CERN) on 6 September 2003 and corrected on 28 October 2003, the Organization's reply of 2 February 2004, the complainant's rejoinder of 9 March and CERN's surrejoinder of 14 May 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Danish national born in 1942, joined the Organization in 1970. Apart from three periods of unpaid leave during which he worked for other international organisations, the complainant was always employed at CERN in the field of human resources. At the material time he held grade 10.

On 1 January 2000 he was transferred to a newly created division, the Division of Education and Technology Transfer (ETT). In an appraisal report signed on 18 March 2002 the complainant's supervisor considered that his work was "below expectations". After the complainant consulted CERN's medical officer, the latter sent a report to an external medical practitioner on 18 April, in which she mentioned "serious conflictual problems at the work place" and said she had the impression that the department where the complainant worked was hoping that he would "hand in his resignation and was exerting psychological pressure which was very akin to mobbing". The complainant was on sick leave full-time from 16 April 2002 until 4 May 2003 and then half-time until 30 June 2003.

On 12 May 2002 the complainant lodged a complaint alleging moral harassment with the Chairperson of the Equal Opportunities Advisory Panel, in accordance with the provisions of Administrative Circular No. 32 on the principles and procedures governing complaints of harassment. The Chairperson of the Panel sent the Director-General the Panel's findings in a memorandum dated 26 February 2003. The Panel considered that "some regrettable incidents that could have been interpreted as acts of harassment" had taken place, but that "in view of their isolated nature and the absence of malicious intent, [the complainant's] treatment [could not] be considered as moral harassment (mobbing), as defined in Administrative Circular 32". On 13 March 2003 the Director of Administration, on behalf of the Director-General, sent the Panel's findings to the complainant's lawyer, informing him that CERN's upper management agreed with the conclusion that the complainant had not been subjected to harassment.

Meanwhile, the complainant had received a personal administrative action dated 27 January 2003, informing him that he had been transferred to a new unit within ETT as from 1 January 2003.

On 2 May the complainant submitted a "request for payment" to the Labour Court (*Tribunal des prud'hommes*) of the Canton of Geneva, in which he claimed 30,000 Swiss francs, plus interest, in damages. He expressed the view that the Labour Court was competent "to the exclusion of any other judicial authority (such as those established by the [International Labour Organization (ILO)])", since according to Article 7 of Administrative Circular No. 32, "victims of harassment are also entitled to institute civil and/or penal proceedings through the competent national courts". On 9 May the Labour Court summonsed the parties to a conciliation hearing to be held on 16 June 2003. At CERN's request, the Permanent Mission of Switzerland to the United Nations Office and to the other international organizations in Geneva reminded the Court on 13 June that, in view of the Organization's immunity from jurisdiction, CERN could not agree to be a party to such proceedings. In a letter of 24 June the complainant's lawyer, referring to the wording of Article 7 of Administrative Circular No. 32, contested the opinion expressed by the Permanent Mission. On 25 June the Registrar of the Labour Court replied that as an administrative body the Court was bound by the interpretations and instructions of the Permanent Mission. On 4 August the lawyer asked

the Department of Justice, Police and Security of the Canton of Geneva to waive CERN's immunity. He said it was "to be feared that [the complainant] might be [...] time-barred from initiating proceedings against CERN before the Administrative Tribunal of the ILO, since the ninety-day time limit allowed had [...] expired". Having been asked to consider this request, CERN refused to forego its immunity, a position which was conveyed to the complainant's lawyer on 30 September 2003 through the appropriate channels.

The complainant lodged this complaint with the Tribunal on 6 September 2003. He indicated that he was challenging the decision of 13 March 2003. On 31 October he filed an internal appeal against the same decision with the Director of Administration, stating that the grounds for his appeal were given in his submission to the Tribunal. He wrote to the Director-General on 13 January 2004, however, withdrawing his appeal and filing a request for payment of 45,000 francs in compensation for damages suffered at work.

B. The complainant asserts that his complaint is receivable on the grounds that the decision he impugns is final and that all remedies have been exhausted. He submits that CERN has instituted a special complaint procedure for harassment complaints, which replaces the review and internal appeal procedures. The Equal Opportunities Advisory Panel established by Administrative Circular No. 32 is thus the only appeal body for such cases. He compares the Panel to the Joint Advisory Disciplinary Board and points out that, according to the Staff Rules, members of the personnel wishing to challenge a decision following a recommendation by the Board must refer their claim directly to the Administrative Tribunal. As far as the time limit for lodging his complaint to the Tribunal is concerned, he argues that Article 7 of the aforementioned Administrative Circular could be interpreted, in good faith, as meaning that he could sue the Organization before the competent national courts. He adds that several persons he consulted and the Labour Court itself had in fact come to that conclusion. He accuses CERN of acting in bad faith insofar as it encouraged him to appeal to the national courts and waited for the ninety-day time limit specified in Article VII, paragraph 2, of the Statute of the Tribunal, to expire before pleading immunity from jurisdiction.

On the merits, the complainant contends that he was subjected to moral harassment by his supervisors and, more generally speaking, by CERN's management. In support of this accusation he mentions his transfer to ETT (a division which, according to him, did not correspond to his field of expertise), the lack of communication, the refusal to draw up a job description, the defendant's total lack of interest in his work, the constant recurrence of purely vexatious and hurtful acts, his exclusion from information, the aim and effect of which was to isolate him completely, the public denigration to which he was exposed, an arbitrary and extremely negative appraisal report, the medical examination he had to attend at the request of his supervisors, and lastly the complete lack of any action by his employer to put an end to the harassment, although it had an obligation to do so according to the case law of the Tribunal. He adds that the duties he has been assigned since he returned from sick leave are at a much lower level of responsibility than he enjoyed previously and are completely unrelated to his skills and experience. In his view, therefore, the defendant is in blatant breach of its obligations towards him.

The complainant claims 45,000 francs in damages for moral injury, plus interest at the rate of 5 per cent per annum calculated from 12 May 2002, the date at which he lodged his complaint with the Equal Opportunities Advisory Panel, and costs.

C. The Organization requested and obtained the authorisation of the President of the Tribunal to limit its reply to considerations of receivability. It points out that the impugned decision is dated 13 March 2003. The complainant did not lodge an internal appeal against that decision within the 60-day limit specified in Staff Regulation R VI 1.03, but only on 31 October 2003 – an appeal which he subsequently withdrew. As in the defendant's view he did not exhaust all available internal remedies, his complaint is clearly irreceivable.

D. In his rejoinder the complainant regrets that the defendant has not pleaded on the merits. He explains that he did not lodge an internal appeal against the impugned decision because in his opinion the latter is final. He points out that the Director-General has still not replied to his request for payment, but adds that this should not constitute an impediment to the present proceedings, since the request is likely to be rejected.

E. In its surrejoinder CERN maintains that the argument that the decision of 13 March 2003 is final is mistaken: the decision was not disciplinary and therefore could not be challenged by means of a direct appeal to the Tribunal. Administrative Circular No. 32 moreover draws a clear distinction between a harassment procedure and a disciplinary procedure.

CONSIDERATIONS

1. Having joined CERN on 1 March 1970 the complainant, after holding various positions, was assigned on 1 January 2000 to the ETT Division as an Administrative Officer. Having been placed on sick leave in April 2002, on 12 May 2002 he lodged a complaint alleging moral harassment with the Chairperson of the Equal Opportunities Advisory Panel, in accordance with the provisions of Administrative Circular No. 32 governing harassment complaints. In a memorandum of 26 February 2003 to the Director-General the Chairperson of the Panel reported the latter's findings: while there had been a progressive deterioration in the complainant's working environment and while "some regrettable incidents that could have been interpreted as acts of harassment" had taken place, in view of their isolated nature the treatment he complained of could not "be considered as moral harassment (mobbing) as defined in Administrative Circular No. 32".

2. CERN's Director of Administration wrote to the complainant's lawyer on 13 March 2003 informing him that the Director-General had endorsed the Panel's conclusion, adding that the Organization was prepared to offer the complainant new duties suited to his qualifications and abilities. Believing that he could bring his case before the Labour Court of the Canton of Geneva, on 2 May 2003 the complainant lodged a "request for payment" with the Court, claiming 30,000 Swiss francs in compensation for the harassment to which he said he had been subjected. CERN, however, refused to waive its immunity from jurisdiction, and the Department of Justice, Police and Security of the Canton of Geneva was duly notified of the fact, on 10 September 2003, by the Permanent Mission of Switzerland to the United Nations Office and to the other international organizations in Geneva. In its letter the Permanent Mission added that "CERN explain[ed] in its letter of 2 September 2003 that [the complainant had] not yet submitted an appeal to CERN in accordance with internal procedures and that he [was] still at liberty to do so. In the last resort, he [could] lodge a complaint with the Administrative Tribunal of the ILO".

3. On 6 September 2003 the complainant filed a complaint with the Tribunal asking it to set aside the decision of 13 March 2003, and in the brief subsequently submitted to the Tribunal he claimed the payment by CERN of 45,000 francs in compensation for the serious moral injury he had suffered on account of the Organization's failure to honour its obligations towards him.

4. After filing his complaint with the Tribunal, the complainant lodged an internal appeal on 31 October 2003 with the Director of Administration. When the Organization expressed doubts regarding the receivability of the appeal, however, the latter was expressly withdrawn by a letter of 13 January 2004, in which the complainant asked the Director-General to pay him 45,000 francs for injuries suffered in the course of his work.

5. The defendant argues – quite rightly – that the complaint is irreceivable. As stated by the defendant in its reply, it was up to the Director-General of the Organization "to take a decision regarding the request for payment submitted in the letter of 13 January 2004".

6. As CERN contends, the complainant has not exhausted all internal remedies since, in the circumstances, he thought that he had to bring his case directly before the Tribunal. In order to justify this direct appeal, the complainant refers to the provisions of Staff Rule VI 1.07, according to which "[a] member of the personnel wishing to challenge a decision shall refer his claim directly to the [Tribunal] in matters concerning [a] decision taken following recommendations by the Joint Advisory Disciplinary Board". It is clear, however, that a decision rejecting a complaint of harassment does not constitute a disciplinary measure within the scope of this Rule. Similarly, in arguing that the decision of 13 March 2003 should be considered "final" within the meaning of Article VII of the Statute of the Tribunal, the complainant overlooks the fact that, according to that Article, an impugned decision is "final" only if the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. In the present case, such means have not been exhausted. The complaint is therefore irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.