Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2894**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. T. against the European Organization for Nuclear Research (CERN) on 25 July 2008 and corrected on 18 September, CERN's reply of 18 December 2008, the complainant's rejoinder of 26 March 2009 and the Organization's surrejoinder of 29 May 2009;

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. Facts relevant to this case are recorded in Judgments 2809 and 2810 delivered on 4 February 2009.

The complainant is a Greek national born in 1971. He was recruited by CERN on 1 March 2002 as a staff member under a three-year limited-duration contract to fill the post of engineer in the Communication Systems Group of the Information Technology Division – which subsequently became the Information Technology Department (hereinafter the "IT Department"). On 1 March 2005 this

contract was extended for one year, after which it was extended again until 28 February 2008, the date of the complainant's termination. At the time he was in career path E, salary band b, step 3.

In the meantime, at the beginning of 2007, seven long-term jobs in six different areas of activity had become available within the IT Department's manpower plan. As his limited-duration contract was due to expire within 18 months and in accordance with Administrative Circular No. 2 (Rev. 3), entitled "Recruitment, appointment and possible developments regarding the contractual position of staff members", the complainant was invited, by a memorandum of 30 March 2007 from the head of the said department, to be assessed by the Departmental Contract Review Board (DCRB) according to a specified procedure. The complainant sent an e-mail to the Human Resources Adviser of the IT Department, who was also the Co-Chairman of the DCRB, in order to obtain further information about the criteria against which he would be assessed. In his reply the Co-Chairman informed him that the criteria applied by the DCRB would principally be those of paragraph 51 of the above-mentioned circular, in other words personal criteria. He also listed the six areas of activity in which long-term job slots were open.

On 20 April 2007 the complainant's candidature was examined by the DCRB. The latter issued its final report on 8 May. The members of the DCRB considered that, while the complainant met all the criteria for long-term employment, he could not be ranked as highly as another candidate also meeting those criteria, because they had observed "some weaknesses in his presentation, communication skills and ability to answer questions".

By a letter of 30 May 2007 the Head of the Human Resources Department informed the complainant that the Executive Board, which had been consulted by the Director-General, had not recommended the award of an indefinite contract, and he invited the complainant to submit his comments on the matter.

The complainant therefore forwarded his comments to the Head of the Human Resources Department in a letter of 12 June 2007, in which he challenged the DCRB's assessment. He requested that a new

assessment be carried out and that his candidature be given a new ranking in order that he might be awarded an indefinite contract. The Director-General replied in a letter of 3 August 2007 that, in his opinion, the complainant's candidature had been treated correctly and that he had decided not to award him an indefinite contract.

On 1 October 2007 the complainant lodged an internal appeal against this decision. In its report of 12 March 2008 the Joint Advisory Appeals Board, noting in particular that certain rules laid down in Administrative Circular No. 2 (Rev. 3) had not been observed during the examination of the complainant's candidature, recommended that the Director-General should uphold the appeal.

The Director-General notified the complainant by a letter of 30 April 2008, which constitutes the impugned decision, that he maintained his decision not to award him an indefinite contract.

B. Relying on both the Tribunal's case law and the texts in force in CERN, the complainant submits that a vacancy notice concerning an indefinite contract for a specific job ought to have been published. He asserts that, unlike the complainants in the cases leading to Judgments 2809 and 2810, he received no job description, since the memorandum of 30 March 2007 offered no indication of the type of job for which an indefinite contract might be awarded, or of the field of activity in question. The complainant infers from this that the assessment procedure is tainted with flaws.

The complainant considers that the DCRB overlooked essential facts because its assessment of his work was incomplete. He adds that its report contains clearly mistaken conclusions, especially with regard to his good appraisal reports.

The complainant also taxes CERN with breaching the principle of good faith and the requirement of reciprocal trust that must govern the relationship between the Organization and its staff. He denounces an obvious lack of transparency evidenced by the fact that the personnel were not informed of manpower plans. He adds that, since there was no vacancy notice or job description, he did not know for which post or on what conditions he was competing. Moreover, he takes the

Director-General to task for ignoring the Joint Advisory Appeals Board's conclusions which were favourable to him.

Lastly, he is of the opinion that there is a major contradiction in the contract policy reflected in Administrative Circular No. 2 (Rev. 3), which results in a misuse of procedure.

The complainant asks the Tribunal to set aside the Director-General's decision of 30 April 2008 and to draw all the legal consequences, namely to order CERN to reconstitute his career as from the date of his termination and to award him an indefinite contract as from that date or, failing that, to order CERN to pay him the equivalent of five years' salary and pensionable allowances. He also claims costs.

C. In its reply the Organization first describes the various procedural stages leading to the award of an indefinite contract under the new contract policy.

It then states that Administrative Circular No. 2 (Rev. 3) makes it clear that the obligation to publish a vacancy notice applies solely to the initial recruitment of staff members. It fails to understand how the non-publication of a vacancy notice could have injured the complainant, given that he was actually assessed for the award of an indefinite contract, that the assessment was objective and conducted in accordance with the procedure stipulated in the above-mentioned administrative circular, and that the non-publication of a vacancy notice had no bearing on the impugned decision. It adds that the complainant obtained all the requisite information regarding the post and the terms of the evaluation, because he exchanged several e-mails on the subject with the Human Resources Adviser of the IT Department. If he wanted more information about the activity for which he would be assessed, it was up to him to request it.

The Organization denies that the assessment of the complainant's work was incomplete. It emphasises that the appraisal reports of candidates for the award of an indefinite contract are only one of the factors considered by the DCRB and that, on the basis of the information received, the complainant was deemed to be less qualified than the candidate who was ranked highest.

Furthermore, the Organization refutes the complainant's allegations concerning lack of transparency and a failure to respect the principle of good faith and the requirement of reciprocal trust. It states, with regard to the alleged lack of transparency, that the internal rules of CERN do not require it to inform the personnel of its manpower plans, but that the personnel is nonetheless regularly advised of the main features of these plans by the Director-General. In this connection, it points out that the complainant was invited, by a memorandum of 30 March 2007 from the Head of the IT Department, to be assessed for long-term employment and that he obtained all the information that he needed to prepare for his evaluation. In view of his profile, professional experience and the duties he was performing at CERN, he could be assessed only for the field of activity which concerned him and not for all six fields simultaneously. The Organization considers that it displayed no bad faith whatsoever in the handling of this case. It also draws attention to the fact that the Director-General took the view that the Joint Advisory Appeals Board's recommendation rested on completely erroneous considerations and conclusions.

Lastly, the Organization denies that there was any misuse of procedure. It considers that it exercised the discretionary authority which the Tribunal allows an international organisation "when it has to take the important decision of turning a limited-duration contract into an indefinite appointment".

D. In his rejoinder the complainant states that, following the delivery of Judgments 2809 and 2810, in which the Tribunal dismissed arguments similar to his own, he is withdrawing the pleas presented in his complaint. Nevertheless, he submits that his situation is dissimilar to that of the complainants in the cases which led to those judgments, and he enters new pleas to demonstrate the unlawfulness of the procedure culminating in the impugned decision. Thus, although he acknowledges that the Appeals Board is an advisory body, the complainant submits that its unanimous recommendation that the Director-General should uphold his appeal "undoubtedly carries some weight and cannot be lightly dismissed".

The complainant reformulates some of the arguments put forward in his complaint. He alleges a lack of transparency in the rules applying to competition procedures, a failure to respect the principle of good faith and the requirement of reciprocal trust, as well as a failure to consider an essential fact, or an obvious misappraisal of the facts.

E. In its surrejoinder CERN says that it does not know why the complainant is pursuing his complaint. It considers that the procedure followed was perfectly lawful, as the Director-General was under no obligation to follow the Joint Advisory Appeals Board's recommendations because, on the one hand, it is only an advisory body and, on the other, its findings in this case were incorrect.

CONSIDERATIONS

1. CERN's contract policy changed in 2006. The conditions on which limited-duration contracts could be converted into indefinite contracts were established by Administrative Circular No. 2 (Rev. 3) of January 2006. For the details of this new contract policy, reference should be made to Judgments 2711, 2809 and 2810.

2. The complainant, whose limited-duration contract in the IT Department expired on 28 February 2008, was informed by his head of department in a memorandum of 30 March 2007 that he was invited to take part in an assessment with a view to the award of an indefinite contract. This assessment was to be carried out by the DCRB. The memorandum indicated that, if the complainant wished to be assessed, he should submit his curriculum vitae and the names of two referees and that the assessment would include an interview by the DCRB.

The complainant asked the Human Resources Adviser of the IT Department to supply some additional information regarding the assessment criteria. The Human Resources Adviser replied that same day that the criteria applied by the DCRB would principally be those listed in paragraph 51 of the above-mentioned circular.

3. Following the assessment the DCRB issued its final report in which it concluded that, while the complainant met all the criteria for long-term employment at CERN, he could not be ranked as highly as another candidate who also met the criteria. On 12 June 2007 the complainant asked that a new assessment be carried out.

On 3 August 2007 the Director-General notified the complainant of his decision not to award him an indefinite contract. On 1 October 2007 the complainant lodged an appeal with the Joint Advisory Appeals Board, which unanimously recommended that the appeal should be upheld.

The Director-General decided not to follow that recommendation and informed the complainant by letter of 30 April 2008 that he maintained his decision of 3 August 2007.

4. The complainant principally asks the Tribunal to set aside the decision of 30 April 2008 and to draw all the legal consequences.

In the brief accompanying his complaint he enters four pleas, namely that the assessment procedure was unlawful, that essential facts were overlooked and clearly mistaken conclusions drawn, that the principle of good faith and the requirement of reciprocal trust were not respected and, lastly, that there was a misuse of procedure.

5. On 4 February 2009 the Tribunal delivered Judgments 2809 and 2810 in cases which the complainant regards as "the other two facets of the dispute concerning CERN's contract policy".

Having taken cognisance of the above-mentioned judgments, the complainant, acting through his counsel, who also represented the complainants in the two above-mentioned cases, announces in his final submissions that he "has too much respect for the Tribunal to press certain pleas put forward in his complaint, which have already been rejected", and that he withdraws all of them.

He comments, however, that his case is quite different to the two previous cases because, in those cases, the Joint Advisory Appeals Board had recommended the dismissal of the appeals, whereas in his case it unanimously recommended that the Director-General should

uphold his appeal. He states that, in the two earlier cases, the Tribunal had implicitly taken the complainants to task for not contacting their Human Resources Advisers, but he points out that he had several exchanges of e-mails with his Human Resources Adviser. He adds that, although the Tribunal has accepted the principle of competition between candidates for the award of an indefinite contract, in his case the competition process was tainted with a number of flaws. He holds that there are major contradictions between the information supplied by the Human Resources Adviser of the IT Department prior to the competition and his testimony before the Joint Advisory Appeals Board. Lastly, he submits that, in the instant case, an essential fact was overlooked, or there was plainly a misappraisal of facts.

6. The complainant emphasises that the Joint Advisory Appeals Board unanimously recommended that the Director-General should uphold his appeal.

While he acknowledges that the Director-General is not bound by the opinion of this advisory body, he notes that the Joint Advisory Appeals Board includes a member nominated by the Director-General and that, for this reason, its unanimous opinion should not be "lightly [dismissed] on the basis that it is merely advisory in nature".

7. The Tribunal recalls that, in accordance with its case law, the head of an international organisation is entitled to depart from an appeal body's recommendation provided that he or she gives clear reasons for not following it (see in particular Judgment 2833, under 4).

In the instant case the Director-General carefully analysed the Joint Advisory Appeals Board's report and gave clear reasons why he could not endorse the latter's opinion.

8. The complainant submits that the competition process was unlawful, because it would appear from the testimony of a member of the DCRB that "[the rules governing] competitions are not applied or interpreted in the same way in the various departments". In the complainant's opinion, these divergences in

the interpretation and application of Administrative Circular No. 2 (Rev. 3) are "regrettable", for candidates have no means of knowing how they will be treated, whereas transparency is an essential rule in a competition.

He holds that it would have been useful for candidates to have known, before the competition, the number of long-term job slots available in each field of activity and the number of candidates whose profile matched a given field of activity.

(a) With regard to the divergences in the interpretation and application of the above-mentioned administrative circular in the various departments, the Tribunal finds that in support of his allegation the complainant merely reiterates the testimony of only one member of the DCRB before the Joint Advisory Appeals Board and that no specific example has been provided to prove that a candidate from another department was treated more favourably when he or she was assessed.

(b) As for the number of long-term job slots and candidates, the Organization rightly points out that the complainant had been informed that at least one long-term job was available in his field of activity in the IT Department's manpower plan and he was likewise informed of the applicable procedure, in particular of the criteria defined in paragraphs 51 and 52 of Administrative Circular No. 2 (Rev. 3).

As already stated in Judgment 2809, the Tribunal considers that the question of the number of available posts is irrelevant, for the complainant could be assessed provided that at least one long-term job was available in his field of activity. In the instant case the complainant was informed by the IT Department's Human Resources Adviser that long-term activity was foreseen in six different areas.

Moreover, none of the applicable texts obliges the Organization to tell the complainant how many candidates have a profile matching a given field of activity.

9. The complainant argues that there are major contradictions between the information supplied by the Human Resources Adviser of

the IT Department prior to the competition and his testimony before the Joint Advisory Appeals Board.

While there is no need to dwell on the issue of whether the information provided by the IT Department Human Resources Adviser was contradictory, the Tribunal notes that he confirmed before the Joint Advisory Appeals Board that the DCRB had assessed the complainant's candidature for just one area of activity, which has never been disputed. It has, however, been ascertained that the complainant had not been informed of this before he was interviewed by the DCRB. A question therefore arises as to whether this manner of proceeding complies with Administrative Circular No. 2 (Rev. 3).

10. Paragraph 50 of the circular states that "[t]he Director-General may award an indefinite contract provided that there is at least one long-term job available for the activity concerned within the manpower plan of the Department concerned". It is plain from this text that a candidate for the award of an indefinite contract cannot be assessed unless a long-term job slot has been identified. It is therefore logical that before being assessed, the candidate should be informed of the job available in the field of activity for which he or she will be assessed.

The Tribunal finds that, in the instant case, contrary to the steps taken in the cases leading to Judgments 2809 and 2810, where prior to their assessment the complainants had received a description of the activity for which they were to be assessed, the complainant did not receive a precise description of the activity concerned before his assessment. Moreover, when he turned to the IT Department's Human

Resources Adviser to request further information, the latter sent him a list of six areas of activity, although in the end the complainant was assessed for only one of them.

The Tribunal concludes from the foregoing that, by assessing the complainant in only one field of activity when he had not previously received a description of that specific field, the Organization breached the rule *tu patere legem quam ipse fecisti*. The impugned decision must therefore be set aside. Nevertheless, in view of the fact that the complainant was assessed along with other candidates and that it has not been established that the candidate ranked highest for the field of activity concerned was treated differently to the complainant, the Tribunal considers that the latter, who left the Organization on 28 February 2008 when his contract expired, is not entitled to reconstitution of his career as from the date of his termination.

The Tribunal considers it fair to award him 30,000 Swiss francs in compensation for the injury suffered.

11. The complainant submits that an essential fact was overlooked, or that there was plainly a misappraisal of the facts in that the DCRB criticised him for some weaknesses in his communication skills. He points out that the DCRB's final report makes no reference to the presentations which he gave at conferences and which he mentioned in his curriculum vitae. The Tribunal must reject this plea, which rests solely on unsubstantiated allegations, while on the contrary the Joint Advisory Appeals Board found in its report that the DCRB had made a very thorough and in-depth analysis of the candidate's capability before expressing the criticism in question.

12. The complainant is entitled to costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. CERN shall pay the complainant 30,000 Swiss francs in compensation for the injury suffered.
3. It shall also pay him costs in the amount of 5,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet