Registry's translation the French text alone being authoritative.

FORTY-EIGHTH ORDINARY SESSION

In re GUTHAPFEL

Judgment No. 490

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organization for Nuclear Research (CERN) by Mr. Claude Guthapfel on 10 July 1981 and brought into conformity with the Rules of Court on 22 July, CERN's reply of 31 October, the complainant's rejoinder of 20 January 1982 and CERN's surrejoinder of 30 March 1982:

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05 and Rules II 1.05, III 1.01 and 1.03 of the CERN Staff Rules and Regulations of 1968 and Regulations II 1.17 and VIII 2.06 of the Staff Rules and Regulations of 1980;

Having examined the written evidence and considering unnecessary the oral proceedings suggested by the complainant;

Considering that the material facts of the case are as follows:

A. On 21 March 1980 the Chief of Personnel of CERN informed all members of the staff holding a contract prescribing a working week in excess of 40 hours that, in accordance with the decisions of the CERN Council, contractual hours were to be reduced with effect from 1 April 1980 to 40 a week. In return, and in accordance with Regulation VIII 2.06 which came into force in 1980. it was decided to grant those staff members (a) special personal allowances by way of compensation for reduction in income, and (b) additional contributions to be paid by CERN to the pension fund. The complainant, who had joined the staff in 1969 at grade 6, had a contract which, in accordance with the Staff Rules and Regulations then in force, provided for a 40-hour working week, but did not expressly prescribe it. On 1 May 1973 he was transferred to a division known as "SB" and promoted to foreman at grade 7, with effect from 1 January 1973, his contract being amended for that purpose. From then until March 1980 he actually worked a 44-hour week, but his contract was not amended to that effect. On 19 March 1980 he applied to the Director-General for the benefit of the compensatory measures. On 14 April his claim was rejected and on 5 May 1980 he appealed to the Joint Advisory Appeals Board. On 30 March 1981 the majority of the Board recommended granting him the additional contributions to the pension fund but not the special personal allowance compensating reduction in income. On 14 April 1981 the Director of Administration rejected the appeal on behalf of the Director-General, and that is the decision now impugned.

B. The complainant argues that as in practice he regularly worked 44 hours a week for several years his position may be assimilated to that of holders of contracts prescribing a 44-hour week, and he should therefore benefit from the compensatory measures. He contends that the four hours which he worked, on the instructions of his supervisors, in excess of 40 a week were not overtime, which should be of an exceptional nature, but "additional". The provisions of his original contract were superseded, in respect of hours of work, by a new agreement which came into effect, by implication, by reason of the additional hours of work which CERN regularly required of him for a period of years. His position being similar to that of holders of contracts prescribing a 44-hour week, there has been breach of the principle of equality of treatment. He accordingly invites the Tribunal to quash the decision of 14 April 1981; to declare that he is entitled to the special personal allowance compensating reduction in income and to the payment of additional contributions to the pension fund with effect from 1 April 1980; and to award him costs.

C. In its reply CERN discusses the relevant provisions of the Staff Rules and Regulations which came into force in 1968 and which were applicable when the contract was concluded with the complainant. It refers in particular to Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05, and Rules II 1.05 and III 1.01. It observes that later editions of the Staff Rules and Regulations carried over those articles from the 1968 edition, except that in the 1980 edition the article which had provided for contracts prescribing more than 40 hours a week Regulation III 1.05 -

was repealed. It concludes that all contracts and all amendments thereto were required to be in writing; that hours of work had to be stated if they differed from the basic working week of 40 hours; and that by accepting the contract the staff member undertook to be subject to the Staff Rules and Regulations. These rules are clear, in CERN's view, and there are no grounds for applying any general principle of law on which the complainant may wish to rely. There is, besides, no substance to his contention that his written contract - which he never asked to be amended to prescribe a 44-hour week - was superseded by a new, implied contract. The additional remuneration he received for overtime hours was paid in accordance with the rules governing staff on a 40-hour week. Nor has there been any breach of the principle of equality of treatment, which does not come into play unless the complainant is in the same position, both in fact and in law, as those who have received the benefits he is claiming. To assimilate the complainant to holders of contracts prescribing a 44-hour week would in fact be contrary to the Staff Rules and Regulations. CERN accordingly invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant develops the arguments in his original memorandum. He observes that his normal working hours after his transfer to the SB Division were 44 a week. The Staff Rules and Regulations stipulate that a staff member shall work either the hours provided for in the rules or in his contract or in excess of those hours, in which case, he is on overtime. Hours regularly performed, for a period of years, in excess of the basic working week, cannot be described as "overtime". The complainant believes that he was in neither of the situations covered by the rules since his hours in excess of 40 a week were not overtime in the true sense. CERN imposed on him conditions which were not provided for in the Staff Rules and Regulations, and thereby acted in breach of the principle of good faith. That CERN is mistaken in contending that amendments to the contract of employment must be in writing is borne out by Regulation II 1.17 of the Staff Rules and Regulations of 1980, which states that where a staff member, for a certain period following the effective date of an amendment to his contract, performs the duties indicated therein he shall be deemed to have accepted it, even if he has not signed it. The complainant also relies on the principle of acquired rights. The payment which he received for four additional hours a week over a period of eight years should be regarded as part of his ordinary salary and therefore constitutes an acquired right. He repeats his contention that in practice he was in the same position as holders of contracts prescribing a 44-hour week and that there has therefore been inequality of treatment.

E. In its surrejoinder CERN points out again that the complainant's contract prescribed a 40-hour week and contends that it is immaterial that other staff in the SB Division had contracts prescribing a 44-hour week. CERN was entitled to require him each week to perform the overtime required, and for years that was what he consented to do. Besides, the number of overtime hours varied, and it cannot therefore be argued that his normal working hours were 44 a week within the meaning of Regulation III 1.03. CERN denies any breach of the principles of good faith or equality of treatment. It also argues that the contention that an amendment to the contract need not be in writing betrays a misunderstanding of the purpose of Regulation II 1.17 - which the complainant cites - that article being applicable only where an actual amendment has been proposed by the Administration. Moreover, there cannot be any breach of the principle of acquired rights in this instance since such a right may be acquired only under the terms of the contract or of the Staff Rules and Regulations. CERN again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. Under a contract dated 6 November 1969 the complainant joined the staff of the European Organization for Nuclear Research (CERN) as a technical designer (electricity). The contract was stated to be subject to the provisions of the Staff Rules and Regulations and to other related official instructions.

The then applicable Staff Rules and Regulations - those which had come into force on 1 January 1968 - stated: "the basic working week shall be a 40-hour, five-day week". The complainant was assigned to the research office and put on a 40-hour week.

On 1 May 1973 he was promoted, and a rider to his contract stated that he was to be a foreman, at a foreman's salary, and transferred to the "SB" Division, "all the other terms and conditions remaining unchanged".

The head of his division then informed him that in his new post his actual hours would be 44 a week. But his contract was not altered. and he was paid at overtime rates for the additional hours. Other members of the division who were appointed between 1 January 1973 and 1 November 1975 were given contracts prescribing a 44-hour week.

For reasons of general policy and after consulting holders of contracts prescribing over 40 hours the Organization decided to reduce contractual hours to 40 with effect from 1 April 1980. The Chief of the Personnel Division proposed to the holders of such contracts a new clause providing for compensation in the form of payment of special personal allowances and the contribution of supplementary annuities to the pension fund.

The complainant's contract prescribed only a 40-hour week, and no amendment to his contract was therefore proposed.

2. Likening his own position to that of others whose contract stipulated over 40 hours, the complainant applied to the Director-General for the benefit of the compensatory measures. His claim was refused on 14 April 1980. The case went to the Joint Advisory Appeals Board, which recommended a compromise. The Director of Administration rejected the recommendation, however, and dismissed the claim on 14 April 1981. The complainant thereupon duly filed the present complaint claiming the full benefits granted by the DirectorGeneral to staff members who on appointment had signed a contract prescribing over 40 hours.

3. The Tribunal will determine the complainant's status by reference to the Staff Rules and Regulations and only where they are silent will it apply the general principles governing international public service.

There is no ambiguity about the texts in point in this case. Where the individual contract between Director-General and official is silent, the working week is 40 hours. But this does not preclude a requirement to do overtime work, and Regulation III 1.05 states that staff shall receive either compensatory leave or a higher rate of remuneration for hours worked in excess of 40 a week.

The same article prescribes a different system of remuneration for staff with contracts stipulating a 44- or 48-hour week: for such staff there is an increase in basic salary, not just in the rate for hours in excess of the basic week', and there is of course no compensatory leave.

4. It is not contested that the complainant never held a contract prescribing more than 40 hours a week. He may not therefore benefit under the Staff Rules and Regulations from the measures adopted in 1980, which apply solely to holders of such contracts.

His argument runs that it was on his supervisors' orders that he did four hours' overtime a week from 1 May 1973, when he was assigned to the SB Division, in which everyone was on a 44-hour week; that CERN was thus itself in breach of his contract with the Director-General; and that this should be interpreted as having created a new agreement superseding the original one. He contends that there is no formal requirement, such as a written text, for an employment contract to be superseded. He has a further argument that there has been breach of the principle of equal treatment.

The Joint Advisory Appeals Board was sympathetic to his case. But the majority of the Board concluded - and necessarily so - that it was not wholly convincing, as may be inferred from their recommendation to the Director-General of a compromise based purely on what they considered to be fair.

5. The Tribunal will decide the case on the law and it holds that there are inescapable objections to the complainant's arguments.

Rule II 1.05 and Regulation II 1.06 state: "Every appointment shall be recorded in a contract setting out the conditions of employment"; "The contract shall indicate: ... the actual length of the working week, if this differs from the basic working week"; and "Any change in the conditions indicated above shall require an amendment accepted by both parties."

In other words, the contract may not be altered by implied or even oral agreement. The Organization may be wrong to require an official - who wishes after all to keep his employment - to provide services not stipulated in his contract.

But that is not the case here. The complainant was aware of the Staff Rules and Regulations when he joined the SB Division in 1973. He did not ask for the conclusion of any new agreement. What is more important, the remuneration he received for overtime hours was paid in accordance with the rules governing staff on a 40-hour week. There is therefore no merit in his allegation of a tacit agreement altering the terms of his appointment. Nor may he plead that CERN was at fault and therefore liable, since it merely applied the rules in force and committed

no abuse of authority.

The principle of equality of treatment is not applicable in this case. It is true that those in like position both in law and in fact should receive like treatment in law. But it is clear from the foregoing that neither in law nor even in fact was the complainant in the same position as those with contracts prescribing over 40 hours a week.

The complaint must therefore fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.