SEVENTIETH SESSION

In re XANTHOPOULOS

Judgment 1066

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Aliki Xanthopoulos against the European Organization for Nuclear Research (CERN) on 21 May 1990 and corrected on 28 May, the Organization's reply of 30 July, the complainant's rejoinder of 31 August and CERN's surrejoinder of 15 October 1990;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Rules II 6.01, II 6.03, VI 1.01 and VI 1.05 and Regulations R VI 1.04, R VI 1.06, R VI 1.09, R VI 1.10, R VI 1.11 and R VIII 2.02 of the CERN Staff Rules and Regulations and Annex R A 10 of the 1973 edition of the Staff Regulations;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a Swiss citizen born in 1929, was appointed by CERN as a typist at grade 4 on 1 March 1958. She became a principal secretary and by 1985 she had reached grade 9. For most of her career she worked as assistant to one and the same supervisor. He retired in April 1989 as Administrator of the Pension Fund, his successor took someone else on as his secretary, and so the complainant had to be reassigned.

In a minute to the Director-General of 6 December 1989 the Chairman of the Governing Board of the Pension Fund suggested terminating the complainant's employment and indicated that if her post were abolished she would be entitled to an indemnity equivalent to a maximum of 34 months' basic salary under the 1973 version of the Staff Regulations. Several offers to reassign her were then made but not taken up. The complainant's counsel informed the Director-General by a letter of 15 March 1990 that he had learned that there was to be no abolition and that she had to choose between leaving with an indemnity amounting to 12 months' basic salary and staying on under a grade 8 appointment; she found neither alternative acceptable and wanted reinstatement in her rights. In a letter of 16 March 1990 to the Head of the Personnel Division her counsel asked that the abolition of her post be acknowledged from 30 April 1989 and that she be granted, failing reassignment, the terminal entitlements provided for under the 1973 Staff Rules and Regulations. CERN's legal adviser answered on 29 March 1990 that the complainant's employment status was being looked into and that in the absence of any administrative decision legal action would be premature. On 21 May 1990 the complainant appealed directly to the Tribunal.

B. The complainant points out that after over thirty years' loyal service she has been waiting for more than a year for the Organization to offer her a job in keeping with her qualifications and grade. Since 30 April 1989 she has had nothing particular to do and her future is still uncertain. CERN's evasiveness and refusal to take a decision have driven her to go straight to the Tribunal, as Rule VI 1.05 of the Staff Rules and Article VII of the Tribunal's Statute allow.

She maintains that under the Staff Rules and Regulations she should qualify for termination due to abolition of post. None of the talks with her about reassignment under Rule II 6.03 has led to any hard offer. Rule II 6.01 provides for termination on abolition of post. Since her post was abolished on 30 April 1989, when her supervisor retired, her contract ended one year later, on 30 April 1990. According to Annex R A 10 to the 1973 Staff Regulations, to the application of which she has an acquired right under Regulation R VIII 2.02 of the current Staff Regulations, the indemnity due to her on termination amounts to 34 months' basic salary.

She invites the Tribunal (1) to find that her post was abolished and that no reassignment in keeping with the Staff Rules and Regulations was offered to her within a reasonable time, (2) to declare accordingly that her termination took effect on 30 April 1990 and (3) to order CERN to pay her 34 months' basic salary in terminal indemnity, plus interest at 5 per cent from 1 May 1990, as well as damages and costs.

C. CERN argues in its reply that the complaint is premature and so irreceivable on the grounds of failure to exhaust

the internal means of redress. The complainant may rely neither on Rule VI 1.05, which provides for "appeal to the Administrative Tribunal ... against the final decision of the Director-General", nor on Article VII(1) of the Statute of the Tribunal, since her case is still under review and no final decision has yet been made. Nor can VII(3) apply since the Organization has not kept silent.

The Organization pleads that in any event the complaint is devoid of merit. Appointing someone else as principal secretary did not entail abolishing the complainant's post. It was her own wish not to keep it and there has been no decision to terminate her appointment. The Organization made firm and timely offers to reassign her and is still looking for suitable work for her. None of the posts she was offered was below grade 8 and all of them were suitable for someone who, like her, had won grade 9 on personal merit. She has no right to have her post abolished, something that only the Director-

General may decide. All that a staff member may do who wants to leave of his own accord is resign.

D. In her rejoinder the complainant rejects the Organization's pleas and enlarges on her own. She denies that her complaint is premature. As Article VII(3) of the Statute prescribes, sixty days elapsed between her claim of 15 March 1990 and the lodging of her complaint. She submits details on the offers put to her and says that they were either vague or irrelevant to her qualifications. If, as the Organization makes out, her post was not abolished, why should CERN have made her any offers at all? In any event she waited one year before taking action.

E. In its surrejoinder CERN develops its contention that the complaint is irreceivable under Article VII(1) of the Statute and that VII(3), which is supposed to be a safeguard against administrative inaction, does not apply. The complainant's allegations that the Organization has been dilatory and has abolished her post are groundless. Only by common consent might her appointment have been terminated.CONSIDERATIONS:

1. The complainant joined CERN in 1958 and for 32 years worked for an official who was head of the Personnel Division and later Administrator of the Pension Fund. On 30 April 1989 that official retired. His successor, having taken on instead someone who had served as secretary to the adviser to the Fund, no longer required the complainant's services.

With the concurrence of the chairman of the governing body of the Fund he recommended to the Director-General on 6 December 1989 that, since someone of the complainant's age - 61 years - and grade - 9 - would be difficult to place in another department, she should be put on retirement at 30 April 1990 on the abolition of her post and be paid an indemnity equivalent to 34 months' basic salary. The complainant, for whom the normal age of retirement is 65 years, agreed with the arrangement.

CERN has not acted upon the recommendation and the complainant continues to draw the salary pertaining to her post and grade.

Receivability

2. On 15 March 1990 counsel for the complainant wrote to the Director-General asking for action on the recommendation for agreed separation. CERN replied on 29 March 1990 that the matter was being examined by the Personnel Division. The complainant filed her complaint on 21 May 1990.

Rule VI 1.01 provides that "Every member of the personnel shall have the right to appeal against any decision of the Director-General ...". Regulation R VI 1.04 requires that an appeal, and a statement of the reasons for it must be addressed to the Director-General, who, in accordance with Regulation R VI 1.06 must, before making his decision, consult the Joint Advisory Appeals Board. According to Regulation R VI 1.09 the Board gives the parties a full hearing in camera. Regulation R VI 1.10 states that the Board must submit its recommendations in writing to the Director-General within 30 days of the last hearing, and Regulation R VI 1.11 that the Director-General must inform the appellant of his decision in writing within sixty calendar days of receipt of the Board's recommendation. Rule VI 1.05 further provides:

"A member of the personnel may appeal to the Administrative Tribunal of the International Labour Organisation against the final decision of the Director-General."

3. Citing Article VII(3) of the Tribunal's Statute, the complainant submits that because sixty days elapsed after her counsel's letter of 15 March 1990 without any decision from CERN her complaint is receivable. She contends that

the statement by the Legal Counsel of CERN that the Personnel Department is looking into her situation does not constitute a decision.

4. Article VII(3) empowers the Tribunal to infer the rejection of a claim in the circumstances set out in that paragraph. But no rejection may be implied here. According to the complainant's own rejoinder CERN made her offers of other posts up to and after 21 May 1990, when she filed. So its reply to counsel's letter was not a mere acknowledgement of receipt that had no legal effect: it was a clear indication that the Organization was actively engaged in sorting out the complainant's professional status.

5. But even if she might rely on VII(3) she would still have to meet the requirements of VII(1), which says that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the relevant Staff Regulations. The complainant has not made use of Rules VI 1.01 and following. Under Rule VI 1.05 she was free to appeal to the Tribunal only against a "final decision", and in the context of the Rules that means a decision taken after submission of the claim to the Joint Advisory Appeals Board and after consideration by the Director-General of the Board's recommendation.

6. The complaint is premature and therefore irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner

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