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

SEVENTY-FIRST SESSION

In re FAVRE

Judgment 1107

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Charles Favre against the European Organization for Nuclear Research (CERN) on 1 October 1990, CERN's reply of 7 December 1990, the complainant's rejoinder of 9 January 1991 and CERN's surrejoinder of 13 February 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles I 1.03 and .04 of the CERN Staff Rules and Article R VI 1.03 of the CERN 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 Frenchman who was born in 1930, joined CERN in 1956 as a fireman. He got an appointment without limit of time in 1958 and was promoted to grade 5 in 1960, to grade 6 in 1962 and to grade 7 in 1974. He was required to work on night shifts and was paid a shift allowance.

In a memorandum which the complainant's supervisor, the head of the Fire and Rescue Service, wrote on 13 June 1986 to the head of the Technical Inspection and Safety Committee (TIS) he recommended that firemen over the age of 55 should not work on shifts, but that since the loss of the shift allowance would cut their earnings by nearly a quarter they should get compensation. He added that in the complainant's case the compensation, paid at degressive rates over three years, would cost 18,000 Swiss francs.

In a memorandum of 8 January 1988, before any decision had been taken on the matter, the head of the Fire and Rescue Service told the firemen that three posts for day work were to become available and that anyone who wanted to stop shift work might have their loss of earnings offset at degressive rates over three years.

In a memorandum of 28 January the complainant's supervisor set out in detail the new duties he was to perform as from 1 April 1988, and he took up the duties at that date.

The general question of compensation was referred to the Standing Concertation Committee, an advisory body. On the Committee's recommendation the Director-General issued on 25 October 1988 a note on "cessation of shift work for medical reasons". Anyone declared unfit for shift work was to be compensated over one year for the loss of shift allowance: for the first three months he would be paid the allowance in full, for the next three he would get three-quarters of the going rate, for another three he would get half and in the last three a quarter.

In a memorandum of 5 July 1989 the Standing Concertation Committee further recommended granting such compensation to anyone who lost the allowance because management stopped the shift work or "in cases of force majeure". The Director-General concurred in a decision of 12 July 1989.

By a personnel action form dated 29 November 1989 the head of the Personnel Division informed the complainant on the Director-General's behalf that he was taken off shift work as from 14 June 1989.

In a memorandum of 21 December 1989 the head of the Fire and Rescue Service suggested granting him the benefit of the decision of 12 July 1989, but in a memorandum of 15 January 1990 the Personnel Administrative Services Division refused on the grounds that there had been no provision for compensation when he had come off shift work and the Director-General's decision had not been retroactive.

On 20 February 1990 he submitted an appeal to the Director-General under Regulation R VI 1.03 seeking compensation over a period of three years as from 1 April 1988. His case was referred to the Joint Advisory Appeals Board. In its report of 17 July 1990 the Board found a binding commitment in his supervisor's memorandum of 8 January 1988 and so recommended allowing him compensation for loss of earnings for one year on the terms set out in the Director-General's decision of 12 July 1989.

By a letter of 28 August 1990, the decision impugned, the head of Administration informed him that the Director-General accepted the Board's recommendation.

B. The complainant submits that his supervisor's memorandum of 8 January 1988 made him a binding promise that he would get compensation under certain conditions. The head of TIS endorsed that promise in a memorandum of 14 March 1988. Though the conditions were met at 1 April 1988 the Organization has failed to keep the promise. The complainant seeks the quashing of the impugned decision, the award of compensation as set out in the memorandum of 8 January 1988 and over the period of three years referred to in his supervisor's memorandum of 13 June 1986, and costs.

C. CERN replies that the complaint is devoid of merit. It had no agreement with the complainant and made no promise to grant him three years' compensation for loss of earnings from shift work. The proposal in his supervisor's memorandum of 8 January 1988, which repeated the one in the memorandum of 13 June 1986, was not about the complainant's own case but about the general question of compensation. It made him no offer, did not bind CERN to pay him any particular amount and did not afford the basis for reckoning any amount: it merely acknowledged that he should get compensation of some kind. His supervisor was not competent to decide anyway: only the Director-General had power to do so under Articles I 1.03 and .04 of the Staff Rules.

The complainant's claim, having been met, is devoid of substance. In his internal appeal of 20 February 1990 he asked for the benefit of the decisions of 25 October 1988 and 12 July 1989. Those decisions prescribe compensation over only one year, and that is what he has been paid.

His claim to compensation over a longer period is inconsistent: he wants to benefit both from the decisions of 25 October 1988 and 12 July 1989, which prescribe one year's compensation, and from his supervisor's suggestion of compensation over three years. No one has had or will ever have ex gratia compensation over that period.

D. In his rejoinder the complainant enlarges on his earlier pleas. He points out that his supervisor's memorandum of 13 June 1986 mentioned not only the three-year period of compensation but also a reckoning of the amount that would be due to him on the assumption of payment at degressive rates. By approving that proposal in his memorandum of 14 March 1988 the head of TIS gave it the effect of a decision. So the complainant had no reason to believe that if he accepted transfer to other duties he would not get the compensation set out in the memorandum of 8 January 1988. His claim to compensation is not inconsistent: as the Joint Advisory Appeals Board held, the promise in that memorandum remains binding on CERN and it is by virtue of that promise that he is entitled to compensation over three years as from 1 April 1988. He presses his claims.

E. In its surrejoinder CERN develops the case made out in its reply, reaffirming in particular that no official decision was ever taken to grant compensation over three years, that it made the complainant no binding promise and that his claim is inconsistent. It observes that the memorandum of 14 March 1988 from the head of TIS was not about ex gratia compensation at all but about the possibility of making up for firemen's loss of earnings on stopping shift work by paying them for overtime hours they had actually put in.

CONSIDERATIONS:

1. The Organization recruited the complainant as a fireman on 17 December 1956. It promoted him to head a team in 1958 and required him to work on shifts.

On 13 June 1986 his first-level supervisor, the head of the Fire and Rescue Service, wrote a memorandum to the head of the Technical Inspection and Safety Committee (TIS) recommending, in agreement with the medical service, that firemen over the age of 55 - as was the complainant - should be taken off shift work. He said that the loss of the shift allowance would mean a "drastic" cut of some 23 per cent in take-home pay: he put the complainant's loss at some 1,000 Swiss francs a month and suggested paying compensation at degressive rates over three years, at a total cost of 18,000 francs.

A memorandum of 8 January 1988 from the head of the Fire and Rescue Service told the firemen of an internal competition to fill three vacant posts for day work, gave descriptions of the posts and said that anyone who changed from shift to day work stood to benefit from arrangements for compensation for loss of earnings to be paid at degressive rates over three years.

A memorandum of 28 January 1988 informed the complainant that as from 1 April 1988 he was put on one of the posts. That meant that he was taken off shift work. But not until 29 November 1989 did he get official notice from the Personnel Division.

As for the compensation for his loss of earnings, the head of TIS told him in a memorandum of 14 March 1988 that the practice was to offer day staff the opportunity of doing overtime hours to be paid at degressive rates over three years. He added that "in one case of long-term illness" the Director-

General had agreed by way of exception to degressive compensatory payments without requiring the actual working of overtime hours.

Arrangements on "cessation of shift work for medical reasons" were approved in a memorandum of 25 October 1988, and they provided for compensatory payments at degressive rates over one year. By a decision of 12 July 1989 they were applied to everyone who came off shift work and on 21 December 1989 the head of the Fire Service asked that the complainant be granted the benefit of retroactive application of that decision. But on 15 January 1990 the head of the Personnel Division answered that the decision was not stated to be retroactive and did not apply to someone who had been off shift work since 1 April 1988.

On 20 February 1990 the complainant submitted an appeal to the Director-General seeking lump-sum payments at degressive rates over three years to offset the loss of his take-home pay since 1 April 1988.

The Director-General refused and he appealed to the Joint Advisory Appeals Board. In its report of 17 July 1990 the Board said that the memorandum of 8 January 1988 had made him a binding commitment and it recommended allowing him compensation for loss of earnings for one year on the terms set out in the decision of 12 July 1989.

The Director-General endorsed that recommendation by a decision of 28 August 1990, the one impugned.

2. The nub of the complainant's case is that the Organization has failed to keep a written promise it made on 8 January 1988, before the decision of 12 July 1989 was taken. Signed by the head of the Fire Service and approved by the head of TIS, the promise was to let him benefit from arrangements for payments at degressive rates over three years in compensation for loss of the shift allowance.

The Organization says that, though the memorandum of 8 January 1988 repeated the proposals of 13 January 1986 by the head of the Fire Service and got the approval of the head of TIS, it never agreed to pay the complainant compensation over three years. The memorandum merely gave him information; it had no effect in law and made him no financial commitment since it said nothing of percentages or base figures. Besides, the head of the Fire Service lacked authority to decide such matters.

3. That reasoning is unsound.

The subject of the memorandum of 8 January 1988 was the announcement of three vacant posts of which descriptions were appended. It said that the successful candidates stood, on changing from shift to day work, to benefit from arrangements for compensation for loss of earnings to be paid at degressive rates over three years. It added that the complainant and two others had already been put forward for the posts but that if other firemen wanted to apply they might do so by 15 January 1988.

An offer of appointment holds good until it is withdrawn or accepted in good faith and without qualification, when it amounts to a contract. The offer in this case was accepted. Indeed CERN admitted as much in its memorandum of 28 January 1988, which confirmed the complainant's appointment as from 1 April 1988 to head a team and his post was much the same in content and description as one of those announced in the memorandum of 8 January.

The complainant's appointment by the memorandum of 28 January 1988 shows that the parties were agreed, one having offered and the other accepted the post, and that the Organization agreed to the financial and other terms stated in the memorandum of 8 January. Indeed the Joint Advisory Appeals Board itself held that there was

agreement between the complainant and his superiors that he would get compensation for loss of earnings. What the Director-General failed to do was implement the agreement reached in 1988; instead he made different arrangements for compensation over only one year.

So it is immaterial that the head of the Fire Service, who signed the offer, lacked authority to make financial commitments on CERN's behalf. Since the offer explained what the financial terms would be he did commit the Organization and it had to comply unless it formally disavowed the commitment. It did not; indeed the head of TIS approved the memorandum of 8 January 1988.

Another material point is that, contrary to what CERN says, it determined its possible financial commitment towards the complainant as early as 13 June 1986 when the figures of 1,000 Swiss francs a month and 18,000 over the three years were given.

4. CERN says that the complainant is seeking compensation he was already offered on 28 August 1990 in keeping with the decision of 12 July 1989 and so he shows no cause of action. But what has been said above makes it plain that the plea is mistaken: he wants compensation over three years, whereas what he has been offered - but has not yet been paid - covers only one. Besides, there is no evidence to bear out CERN's contention that he wants to benefit both from the decision of 12 July 1989 and from the arrangements in the memorandum of 8 January 1988.

The Organization observes that it has not yet paid anyone ex gratia compensation over three years. The point is irrelevant because the offer in that memorandum was specific and circumstantial and afforded the basis of agreement between the parties.

The conclusion is that since it was a mistake of law to refuse the complainant the compensation he had been offered in the memorandum the impugned decision cannot stand.

DECISION:

For the above reasons,

1. The Director-General's decision of 28 August 1990 is set aside.

2. CERN shall make payments to the complainant at degressive rates over the three years from 1 April 1988 in compensation for loss of the shift allowance.

3. It shall pay him 1,500 Swiss francs in costs.

In witness of this judgment Tun Mohamed Suffian, Vice- President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Mohamed Suffian
Mella Carroll
E. Razafindralambo
A.B. Gardner

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