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

SEVENTY-FOURTH SESSION

In re ALBERTY (No. 2)

Judgment 1236

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. José Alberty against the European Organization for Nuclear Research (CERN) on 21 February 1992 and corrected on 24 March, CERN's reply of 12 June, the complainant's rejoinder of 15 July and the Organizations surrejoinder of 28 September 1992;

Considering Articles II, paragraphs 5 and 6, and VII, paragraph 1, of the Statute of the Tribunal, Rule V 1.01 and Regulation R II 6.06 of the CERN Staff Rules and Regulations;

Having examined the written submissions and decided not to order hearings, 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's relationship and his status as an unpaid scientific associate with CERN are explained in Judgment 1166 of 15 July 1992 under A. From 1 April 1990 to 30 September 1991 he held an appointment, at CERN, with the World Laboratory as an "instructor" and was paid an allowance under that appointment.

A memorandum of 14 August 1991 from the Fellows and Associates Service informed him that CERN's payments to him on behalf of the World Laboratory would end at 30 September. On 1 October he lodged an internal appeal against that memorandum on the grounds of failure to give the notice of dismissal prescribed in Regulation R II 6.06 of CERN's Staff Regulations.

By a letter to the Director-General of 9 October he claimed social security coverage, including pension insurance.

Writing on the Director-General's behalf on 26 November 1991, the Head of Administration rejected his appeal of 1 October on the grounds that the memorandum of 14 August had not ended his contract with CERN and that Regulation R II 6.06 therefore did not apply; as an unpaid associate he had an outside employer and it was up to that employer to give him social security coverage. The decision of 26 November is the one he is challenging.

On 15 January 1992 he lodged a second appeal, against CERN's refusal of unemployment benefit, and asked for clarification about his first appeal, the one of 1 October 1991, and his claim to pension insurance. The Director of Administration replied on the Director-General's behalf on 21 February 1992 reaffirming the position stated in the letter of 26 November 1991 and explaining that the appeal proceedings were adjourned pending a ruling by the Tribunal on the first complaint he had lodged with it.

B. The complainant submits that under his contract he is a "member of the personnel" and therefore covered by the Staff Rules and Regulations. By not telling him until 14 August 1991 that his appointment as a scientific associate would end at 30 September 1991 CERN failed to give him the two months' notice required by Regulation R II 6.06. Its refusal of pension insurance is also in breach of Rule V 1.01.

The complainant asks the Tribunal to quash the impugned decision and grant him any consequent relief. He also seeks costs.

C. CERN contends, as it did in reply to the complainant's first complaint, that the Tribunal is not competent because he has no employment relationship with the Organization and that his complaint is irreceivable because he has no locus standi.

It submits that his complaint is further irreceivable because there is no administrative decision and he has not exhausted the internal means of redress. The memorandum of 14 August 1991 he appealed against on 1 October

1991 merely told him what action CERN was taking on the instructions and on behalf of an outside body, the World Laboratory. As for pension insurance, he did not claim it until 9 October 1991, CERN refused the claim on 26 November 1991, that is the only challengeable decision, and it is his letter of 15 July 1992, not, as he makes out, the one of 9 October 1991, that may be treated as an internal appeal. In its letter of 21 February 1992 CERN did not refuse to follow the internal appeal procedure but merely adjourned the proceedings pending the Tribunal's ruling on the first complaint. Since the complainant has not awaited the outcome of those internal proceedings he has not exhausted the internal means of redress. For that reason too his complaint is irreceivable as to his claim to pension insurance.

On the merits the Organization submits that the notice required under Regulation R II 6.06 applies only to dismissal of a staff member. Since the memorandum of 14 August 1991 contained no decision on the complainant's appointment with CERN it was not in breach of the rules on notice.

Nor is CERN under any duty to grant the complainant pension insurance coverage. Rule V 1.01 of the Staff Rules merely declares that "A social security scheme shall safeguard a) the members of the personnel against the economic consequences of unemployment and old age". In Europe that is ordinarily the employer's scheme; for CERN officials it is the Organization's own social security scheme and for scientific associates, who are employed by some national organisation, the employer's scheme.

D. In his rejoinder the complainant cites a letter sent to CERN in 1973 by the competent Swiss federal government department in Berne in support of his contention that he was working for and paid by CERN and there was therefore no doubt about his status as its employee. Since he had no other employer it therefore had a duty to let him have pension insurance coverage. He objects to its disclosing one of the items of evidence appended to its reply and asks that the item be struck out on the grounds that it is irrelevant and levels serious charges against him.

E. In its surrejoinder the Organization, in the light of Judgment 1166, drops its pleas about the Tribunal's competence and the complainant's locus standi. It states that the proceedings relating to his second internal appeal have resumed. It points out, however, that contrary to what he seems to think the nature of its relationship with an unpaid associate is determined, not by its agreements with the host State, but by the Staff Rules and Regulations. It presses its pleas on the other issues.

CONSIDERATIONS:

1. Until 31 January 1992 the complainant held an appointment as an unpaid associate at CERN on the terms that are set out in Judgment 1166 of 15 July 1992 under 1.

In that judgment the Tribunal dismissed the claim in his first complaint to the quashing of the decision not to renew his appointment.

This case is about his entitlements to notice of dismissal and to pension insurance.

By a memorandum of 14 August 1991 the Fellows and Associates Service of CERN told him that the payments he had been getting from it on behalf of the World Laboratory would end at 30 September 1991. On 1 October he lodged an internal appeal against the memorandum on the grounds of failure to give proper notice of dismissal. On 9 October he asked for social security coverage including pension insurance. A letter of 26 November from the Head of Administration told him on the Director-General's behalf that the memorandum of 14 August had not ended his appointment with CERN, as an unpaid associate he was in the employ of someone else, and it was his employer who was responsible for social security coverage.

On 15 January 1992 he lodged a second appeal, against that letter. The Director of Administration replied on 21 February saying that the memorandum of 14 August conveyed no decision of CERN's; reaffirming, as to pension insurance coverage, that CERN was not his employer; and adding that the appeal proceedings were adjourned until the Tribunal had ruled on his first complaint.

What he is impugning is nevertheless the Head of Administration's letter of 26 November 1991.

2. The Organization submits in its reply that the Tribunal is not competent and that the complainant has no locus standi, but in its surrejoinder, filed after the publication of Judgment 1166, it withdraws those objections. It is right to do so since that judgment dismissed them for the reasons stated therein under 3 and 4.

3. What the complainant wants is the quashing of the letter of 26 November 1991. Though it deals with three distinct issues - notice, unemployment benefit and pension insurance - he himself explains that this complaint is about pension insurance and notice.

4. As to pension insurance the Organization argues that the complaint is irreceivable for failure to exhaust the internal appeal procedure. It recalls that he first raised the matter in his letter of 9 October 1991; that the answer was its own one of 26 November; that he filed his internal appeal on 15 January 1992 against that letter; and that it replied on 21 February 1992.

In its surrejoinder it says that, the Tribunal having ruled on his first complaint on 15 July 1992, the internal appeal proceedings have resumed.

It is therefore right in contending that there is not yet any final decision on the claim to pension insurance. Since the internal means of redress have not been exhausted the complaint is irreceivable on that score.

5. CERN argues that insofar as he is alleging failure to give him notice his complaint is irreceivable because there is no administrative decision.

It is mistaken. The letter of 26 November 1991 from the Head of Administration was plainly CERN's answer to his internal appeal of 1 October 1991 against the memorandum of 14 August 1991. On the issue of notice it is therefore a final decision and meets the requirements for receivability in Article VII(1) of the Tribunal's Statute.

6. As to the merits of his claim to the quashing of the decision of 26 November 1991 on the matter of notice, the complainant alleges breach of Regulation R II 6.06 of the Staff Regulations, which prescribes two months' notice in the event of dismissal for an unpaid associate holding a "fixed-term or term contract".

It appears from the decision of 26 November 1991 that the memorandum of 14 August 1991 which he challenged in his internal appeal did not end his appointment as an unpaid associate and that, to quote the text, it was "still in force today". All the memorandum did was confirm what he had already learned from one of 18 July 1991, namely that his appointment as an "instructor" with the World Laboratory was extended. That point was made in Judgment 1166, under 5, and the conclusion was that "the decision he impugns is irrelevant to his contract with CERN, which continued until 31 January 1992".

His plea that he was not given proper notice therefore fails.

7. He applies in his rejoinder for the striking out of a text CERN appends to its reply.

The text being irrelevant to this case, the Tribunal will not entertain the application.

Nor is there any need to take up the matter of the per diem allowance.

8. Since his main claims fail on the grounds set out above, so too must his claim to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot

A.B. Gardner

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