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

SEVENTY-FIFTH SESSION

In re MANGEOT (No. 2)

Judgment 1290

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Bernard Mangeot against the European Organization for Nuclear Research (CERN) on 24 November 1992, CERN's reply of 9 February 1993, the complainant's rejoinder of 25 March and the Organization's surrejoinder of 29 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulation R II 6.02 of the CERN Staff 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 joined the PS Division of CERN in 1985 as an operation technician at grade 6 under a three-year appointment. After two extensions his contract was to expire at 31 July 1992. In his first complaint, on which the Tribunal ruled in Judgment 1184 of 15 July 1992, he objected to a decision of 9 July 1991 to refuse him an indefinite appointment and extension of his fixed-term contract. The Tribunal quashed that decision and sent him back to the Organization for review of his claims.

In a letter of 20 July 1992 - ten days before his contract was to run out - he told the Director-General that he would welcome any offer of a vacant post and asked what action CERN would be taking on Judgment 1184. In his reply of 31 July the Director-General notified extension of his contract by seven months, to 28 February 1993, to allow time for review of his position. On 19 August he was paid the one month's remuneration in damages and the costs awarded in the judgment.

A report dated 3 August 1992 on an inquiry in the complainant's group in the PS Division had concluded that he failed to qualify for an indefinite appointment and that further extension beyond February 1993 would be undesirable. His division leader suggested seeing him on 6 August to tell him the outcome of the inquiry and hear his comments but he was absent on sick leave. Instead the division leader sent him on that day a copy of the recommendation against extension and invited comment. His reply of 20 August did not sway the division leader, who passed his file on to the Personnel Division with a final recommendation against the grant of any new contract.

The Director-General decided not to extend his appointment beyond 28 February 1993. While the Director-General was absent that decision was notified to the complainant by a letter which the Director of Research signed on 27 August 1992 and which is now impugned.

B. The complainant submits that the decision of 27 August was unlawful because it was taken without authority, overlooks essential facts, rests on misappraisal of the facts and shows serious procedural flaws. Nor does it give proper effect to Judgment 1184 and so, should his claims be disallowed, he pleads failure to execute the judgment.

Article R II 6.02 of the Staff Regulations empowers the Director-General himself to decide whether to renew an appointment. The letter of 27 August, though signed by the Director of Research, says nothing of delegation of authority. So CERN has disregarded the warning against such oversight in Judgments 1151 (in re Girod and Peyret), 1184 and 1185 (in re Mermier).

The Organization built its case against him entirely on adverse comment on his performance, but his supervisors' assessments were often conflicting.

He pleads procedural flaws. Although illness kept him from turning up on 6 August 1992 his division leader set no alternative date. Letters setting out the duties he was to have while "on loan" to another division were sent out after the cancellation of the meeting and dated 6 August; so the meeting's only purpose must have been to tell him of the recommendation against renewal. CERN also failed to put his case to the ad hoc Indefinite Appointment Review Board.

In his submission CERN was plainly loth to change its mind about getting rid of him. It denied him the yearly interview which the rules say should take place in the first quarter, yet it reported all the same that such an interview had occurred; it withheld his yearly increment; it harassed him over payment of his allowance for the shift work his doctor had declared him unfit for; it put him in another division "on loan"; and it questioned the leave he took to use up his annual entitlement, his sick leave and the time he took off to look for a job.

He seeks the quashing of the decision of 27 August 1992 and reinstatement, material and moral damages plus interest, and costs.

C. In its reply CERN submits that a competent officer took the decision of 27 August 1992. By a memorandum of 7 August the Director-General expressly delegated authority to the Director of Research to replace him during his absence from 22 August to 2 September 1992. Such delegation is a commonly accepted feature of decision-making in any administration.

The decision is lawful: the complainant met only one of the four conditions for grant of an indefinite appointment. That was the view not just of his first-level supervisor but of all his supervisors. Opinions of him shifted from time to time because his work and conduct were uneven, and that was no fault of CERN's.

It was because of his long absence that the meeting called for under the rules could not take place. When he took up CERN's invitation to comment in writing he did not protest that there had been no meeting. CERN filed his comments and took due account of them. It could not put his case to the Indefinite Appointment Review Board because by July 1992 it had finished work for the year.

The complainant's charges of harassment are irrelevant to this case and do not in any event warrant an award of damages. The matter of his leave is settled.

CERN has fully executed Judgment 1184: it paid him in August 1992 the sums it owed; a competent officer took the new decision; no essential facts were overlooked; and he was told the reasons for not renewing his appointment.

D. In his rejoinder the complainant presses his plea that the officer who signed the letter of 27 August had no authority to do so. In support he relies on a memorandum on delegation of authority which the Director-General sent to the Director of Administration on 17 February 1992. The annex to that memorandum states that authority may not be delegated for such staffing decisions as "refusal of indefinite duration contracts". The Director-General himself signed the refusals addressed to other complainants whose cases the Tribunal sent back to the Organization.

CERN based its decision on assessments made after the judgment just as if the Tribunal had not set aside its decision of 9 July 1991. Besides, it announced in September 1992 that it would refer a similar case to the Indefinite Appointment Review Board.

The complainant applied for - but failed to get - appointment to the post he had been assigned to "on loan" for four months, even though his supervisor had found his work satisfactory. CERN merely shunted him into an improvised job so as to edge him out into the ranks of the unemployed.

E. In its surrejoinder CERN answers the arguments in the rejoinder. The complainant's allegation that the author of the decision of 27 August 1992 lacked competence is idle: the Director-General had expressly delegated authority to the Director of Research during his absence. CERN took account of all the essential facts in the file, including the fresh appraisals of the complainant's performance made in 1991 and 1992. The Director-General's reasons for not extending his appointment were the same as those his division had notified to him. The Organization properly executed Judgment 1184 and the complainant has sustained no actionable injury.

CONSIDERATIONS:

1. CERN appointed the complainant in August 1985 as an operation technician in the PS Division under a fixed-

term appointment which was extended several times.

By Judgment 1184 of 15 July 1992 the Tribunal set aside a decision of 9 July 1991 neither to renew his appointment nor to convert it into an indefinite one. On the grounds that the officer who had taken the decision had lacked authority to do so the Tribunal sent the case back for review of the complainant's claims.

On 31 July 1992 the Director-General informed the complainant that his appointment was extended by seven months, to 28 February 1993, to allow time for review of his contractual status.

On 27 August 1992 the Director of Research wrote to the complainant on the Director-General's behalf and on the recommendation of the Leader of the Division to say that his appointment was not to go beyond 28 February 1993. That is the decision impugned.

2. The complainant's first plea is that the officer who signed the decision of 27 August 1992 was not competent to do so. He observes that according to the annex to a memorandum of 17 February 1992 about delegation of authority the Director-General did not delegate authority to sign on his behalf a staffing decision relating to any of the matters listed in that annex, and they include "termination of contracts".

Yet the complainant acknowledges that, as was held in Judgment 1184, that rule does not preclude delegation of signature, provided that it is express, or amendment of the annex "in the form of a duly notified Revised Version", as the memorandum requires. And such are the circumstances of this case. By a memorandum of 7 August 1992 the Director-General, who was expecting to be absent from 22 August to 2 September 1992 authorised the Director of Research "to exercise any authority that may be necessary on my behalf during my absence".

Such delegation satisfied the prescribed conditions since the revised version of the annex was duly notified on 7 August 1992 in the form of a temporary amendment to all those who had received the memorandum of 17 February 1992. Moreover, to comply with the requirements of Regulation R II 6.02, which requires six months' notice in the event of non-renewal of a fixed-term appointment, the decision had to be taken six months before 28 February 1993, the date of expiry, i.e. by 31 August 1992. So there was no question of awaiting the Director-General's return.

The plea fails.

3. The complainant contends that the impugned decision neglects essential facts, rests on an obvious misreading of the evidence and is tainted with serious procedural flaws. He has a subsidiary plea that the decision failed to execute Judgment 1184 properly.

4. He objects to the recommendation by the division leader which the Director-General endorsed on the grounds that it was based on unfavourable comment by his supervisor, who had nevertheless qualified it.

The Director-General enjoys wide discretion in the matter of renewal of a fixed-term appointment and the Tribunal will exercise only a limited power of review. It will, moreover, show especial restraint when a decision not to renew rests on appraisal by the staff member's own supervisors: because of their technical qualifications and familiarity with his work and personal attributes they are, after all, best fitted to advise the Director-General.

The fact that the decision rests solely on adverse assessments of the complainant's performance does not make it unlawful if it was possible to regard such assessments as decisive. Moreover, there is no evidence to suggest that the favourable comments amounted to an essential fact. Although the complainant cites such comments in reports by former supervisors and even the results of tests by his latest supervisors, the evidence is not cogent. The favourable comments all relate to the period from 1987 to 1990, i.e. prior to 9 July 1991, the date of the quashed decision, whereas the recommendations that the decision of 27 August 1992 is based on cover the later period.

5. He further argues that the Tribunal ordered review of the period prior to the quashed decision of 9 July 1991 and that CERN was therefore not free to take account of dubious assessments of him in the later period. But the argument fails because it misconstrues the Tribunal's ruling in Judgment 1184, which meant that the complainant's claims were to be entirely reviewed for the purpose of taking a new decision on them.

The conclusion is that the earlier comments by his supervisors did not amount to essential facts for the purpose of determining whether his contract should be renewed beyond the date of expiry, 28 February 1993. Nor may the

Director-General be properly accused of having misread the evidence on that score.

6. The complainant objects that the impugned decision was the outcome of seriously flawed proceedings in that CERN failed to observe the procedure set out in the Organization's bulletin of 27 April 1992 headed "Indefinite Appointment Review 1992".

But since such alleged flaws cannot affect the lawfulness of the decision not to renew his appointment that plea too must fail. So must his allegations about incidents which he says show CERN's determination not to grant him an indefinite appointment: such incidents are immaterial to the lawfulness of the non-renewal.

7. Lastly, the complainant puts forward the subsidiary plea that the Director-General failed fully to discharge his obligations under Judgment 1184 in that the Organization ought to have founded its decision on the evidence it had at its disposal in July 1991, not on facts subsequent to that judgment.

That plea was dismissed in 5 above. Although quashing the decision of 9 July 1991 restored the status quo, the complainant was deemed not to have received by that date the notice of non-renewal, and so the new decision was required to take account of his career up to the date at which it was taken, and that was inevitably later than 9 July 1991.

8. The complainant further contends that the Organization did not inform him in 1992, any more than it did in 1991, of the reasons for the non-renewal.

That is not borne out by the terms of the decision of 27 August 1992, which says that the reasons for the decision not to extend his contract beyond the date of expiry "have been notified to you by your division leader and you have had the opportunity of commenting". The plea is therefore mistaken in fact.

9. Yet the Organization has not taken full account of the consequences of the quashing of the decision of 9 July 1991. It decided only on the complainant's claim to renewal of his appointment, not on his claim to an indefinite one, although the Tribunal ordered it to take a decision on all of his claims.

Since for the reasons set out above the non-renewal is lawful his appointment duly expired at the date set in the decision, 28 February 1993. The complainant has since ceased to be a member of the staff and is therefore not entitled to an indefinite appointment.

But the incomplete execution of Judgment 1184 and the merely implied and indeed unexplained decision not to grant him an indefinite appointment have caused him injury for which he is entitled to redress.

10. Since his claims under the last head are allowed he is entitled to an award towards costs.

DECISION:

For the above reasons,

1. The complaint is dismissed insofar as it seeks the quashing of the decision of 27 August 1992 not to renew the complainant's appointment.

2. The Organization shall pay him 5,000 Swiss francs in damages for the injury due to its partial failure to execute Judgment 1184.

3. It shall pay him 2,000 Swiss francs towards costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda

Mella Carroll
E. Razafindralambo
A.B. Gardner

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