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

SEVENTY-FIFTH SESSION

In re GIROD (No. 2)

Judgment 1300

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jean-Pierre Girod against the European Organization for Nuclear Research (CERN) on 2 October 1992, CERN's reply of 18 December 1992, the complainant's rejoinder of 12 March 1993 and the Organization's surrejoinder of 30 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Chapter II, Section 1 of the CERN Staff Rules 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, a Frenchman born in 1959, was employed by CERN as a mechanic in the "PPE" Division from 1 October 1983 to 30 September 1991. Not having had his fixed-term appointment renewed, he and another official, Miss Catherine Peyret, filed complaints on which the Tribunal ruled jointly in Judgment 1151 of 29 January 1992. It quashed the decision he had impugned and sent his case back to CERN for review of his claims in line with the judgment. It went on:

"Unless Mr. Girod got an extension of appointment of which the Tribunal has not been informed, he left the Organization at 30 September 1991. Pending final settlement, therefore, the Organization shall make him a provisional award of an amount equivalent to six months' remuneration, to be subtracted from the amounts that it will ultimately pay to him."

In a letter of 5 February 1992 the complainant informed the Director-General that he had been unemployed since leaving the Organization and offered to come back on any suitable post. The Director-General answered on 3 March that he would review the case in the light of Judgment 1151 and pay him the six months' remuneration and the 4,000 Swiss francs in costs awarded by the Tribunal. CERN made the payments to him on 14 April 1992.

In a letter of 27 April 1992 an officer of the Personnel Division told him that an Ad Hoc Indefinite Appointment Review Board was to review his case and invited him to submit any documents he wanted the Board to look at. On 20 May he saw briefly the leader of the PPE Division, who abided by the earlier recommendation against giving him an indefinite appointment and gave him a copy of the recommendation along with comments by the deputy leader of division, the leader of the Project Bureau and the leader of his group. On 25 May the complainant sent the division leader his observations. The division leader told him on 10 June that they were groundless and would make no difference. On 25 June the Review Board met and recommended against the grant of a permanent appointment.

In a letter of 29 July 1992 to his former division leader the complainant took issue with the procedure. In a letter also dated 29 July which was posted to him on 7 August, the Director-General notified the decision to offer him neither an indefinite nor an extension of his fixed-term appointment. That is the decision he is challenging.

B. The complainant submits that the decision of 29 July 1992 is unlawful because it overlooks essential facts and rests on a mistaken appraisal of the evidence and a mistake of law. Since in his view it does not give proper effect to Judgment 1151 either, his complaint is also an application for execution.

The impugned decision rests on a recommendation from his division leader, who endorsed the opinions of his deputy and others, mostly former colleagues and managers of enterprises he had worked for earlier. Only one of them had been his supervisor at CERN - his former group leader - and what he said on 19 May 1992 was at odds

with what he had said on 5 July 1990, in favour of an indefinite appointment. How was CERN able to round up witnesses after Judgment 1151 to support its own case and to get one of them to recant so blatantly? By relying on such evidence the division leader and the Director-General misread the facts, the more obviously so since his first-level supervisors had on several occasions praised his work and conduct.

The complainant was himself in the predicament the Director-General had described at a staff assembly on 17 December 1990: where group leader and division leader disagreed no decision on the grant of an indefinite appointment was to be taken until the next year, after a review of the case. That practice was not kept, and so the decision, which has caused the complainant serious injury, shows a mistake of law.

The procedure culminated in the impugned decision was improper. Although the division leader did see the complainant on 20 May 1992, it was just to say that he was keeping to his recommendation against further appointment. The complainant's comments do not seem to have been passed on to the Board as they should have been.

The complainant submits that CERN never terminated his appointment properly and, failing an indefinite appointment, should have offered him an extension long enough to allow of further objective assessment of his performance. The Organization advertised vacancies for mechanics in the local press on 1 July 1992. Unemployment has caused him grievous injury since he left the Organization and for that he is entitled to redress. CERN's dilatoriness in paying him the amounts due warrants payment of interest.

Should his claims be disallowed he puts forward the subsidiary pleas that CERN has failed to execute Judgment 1151. In Judgment 1151 under 7 the Tribunal ordered it to pay him a "provisional award" of an amount equivalent to six months' remuneration to be subtracted from the amounts it would "ultimately" pay him. Although CERN has paid him the provisional award it has made no final payment.

He asks the Tribunal (1) to quash the Director-General's decision of 29 July 1992, (2) to order his reinstatement as from 1 October 1991 and (3) subsidiarily to order CERN to grant him further compensation in an amount of not less than ten months' pay. He claims in any event (4) damages for serious moral and material injury, (5) interest on the amounts due to him and (6) costs.

C. In its reply CERN denies that the Director-General's decision was unlawful. Only its desire to be objective led it to consult third parties. As for the inconsistency between the two assessments by his supervisor, the first was a general one and the other rated him against the four specific conditions for the grant of an indefinite appointment. Division leaders are in charge of staffing matters and report to the Director-General, who under Chapter II, Section 1, of the Staff Rules has the authority to grant appointments.

The impugned decision shows neither any misappraisal of the evidence nor procedural flaws. The final decision was the Director-General's, and it was based on the division leader's recommendation, which followed consultations within the division, and on a recommendation from the competent Board.

There was no mistake of law either. The good assessments that the complainant makes so much of are just references intended to help him to find other work.

The Organization rejects the charge of failure to execute Judgment 1151. It paid him in April 1992 the six months' remuneration and the sum of 4,000 Swiss francs in costs. It undertook a review of his case late in March 1992 and issued a duly substantiated final decision in July in keeping with the procedure set out in CERN's weekly news bulletin No. 18/92 of 27 April 1992. On 24 October 1990 it gave him 10 months' notice of termination, and that precludes any claim to further compensation.

D. In his rejoinder the complainant presses his charge of failure to give effect to Judgment 1151. The six months' pay was just a provisional award, and the full indemnity should cover pay for the period from 30 September 1991, the date of the decision the Tribunal set aside, to 10 August 1992, when he got notice of the decision of 29 July. To the amounts due him for those ten months and ten days - less the provisional award - must be added the six months' notice prescribed in Regulation R II 6.02 of the Staff Regulations, plus interest.

There was no difference in substance between his supervisor's recommendation of 5 July 1990 for the grant of an indefinite appointment and his recommendation of 19 May 1992: both were intended to establish whether he met the conditions for such an appointment and those conditions remained constant. CERN methodically discarded the

views of any supervisors of his who had thought highly of him in favour of opinions from people who had never even known him. Its failure to consult his first-level supervisors and the bogus meeting with his group leader are procedural flaws in the impugned decision.

Neither in the context of this dispute nor in the earlier one had CERN ever explained its reasons for refusing to extend his fixed-term appointment.

He contends that he got no notice: the decision of 29 July 1992 was given immediate if not retroactive effect because CERN maintained that it was merely correcting its decision of 24 October 1990. That was in breach of the rule against retroactivity. The indemnity he claims is not a "further" one but is to be granted in lieu of notice in accordance with the Staff Regulations.

E. In its surrejoinder CERN reaffirms that it properly executed Judgment 1151. Though the award made in that judgment was "provisional" and would have been subtracted from any further amount he might have got after review of his case, it became final on confirmation of the decision of 30 September 1991, which had only been set aside on a procedural point. CERN points out that the Tribunal never ordered his reinstatement.

The decision of 29 July 1992 was lawful: each of the complainant's supervisors was consulted, their appraisals tallied, he had every opportunity to state his case - both at the meeting of 20 May and in writing - and the Organization duly gave him the reasons for the measure.

CONSIDERATIONS:

1. The complainant was employed by CERN as a mechanic at grade 5 in the PPE Division. Judgment 1151 of 29 January 1992 set aside a decision of 24 October 1990 refusing him extension of his fixed-term appointment beyond 30 September 1991 and an indefinite appointment. The Tribunal sent the case back to CERN for review of his claims in line with what was said in the judgment. It observed that unless he had got an extension of appointment in the meantime he had left the Organization at 30 September 1991. It ordered CERN, pending final settlement, to make him "a provisional award of an amount equivalent to six months' remuneration".

In answer to a letter of 5 February 1992 from the complainant the Director-General wrote to him on 3 March saying that his case was to be reviewed in line with Judgment 1151. For that purpose and on the instructions of the Leader of the PPE Division the Leader's deputy looked at the complainant's application and commented in a memorandum of 18 May. On 20 May the division leader told the complainant that he did not intend recommending extension of appointment. The complainant submitted observations, but the division leader upheld his decision on 10 June. The Indefinite Appointments Review Board endorsed it, and so did the Director-General in a decision of 29 July 1992, the one now impugned.

2. The complainant seeks the quashing of the new decision to grant him neither an extension nor an indefinite appointment. He argues that it overlooked essential facts, that it was based on obvious misappraisal of the evidence and on a mistake of law and that the procedure was gravely flawed. He adds that in any event CERN may not be deemed to have properly executed Judgment 1151.

The alleged procedural flaws

3. The complainant has three objections to the procedure that was followed to determine whether he was to have an indefinite appointment.

(1) Neither the division leader nor an "assessor" nominated by him had an interview with him before making the recommendation, although that was required in a text that the Administration issued on 10 July 1990 under the heading "Background information for the division leaders".

(2) His case was not put to the Indefinite Appointments Review Board in accordance with CERN bulletin No. 18/92 of 27 April headed "Indefinite Appointment Review 1992".

(3) The Organization consulted people who had not been his supervisors and failed to consult those who had been.

None of his objections is sound.

4. Pleas (1) and (2) conflict with the facts as they appear on the evidence. The complainant himself does not seem to be denying that his division leader saw him in his office on 20 May 1992 and allowed him ten days in which to answer in writing the comments in memoranda then handed over to him. And his case did go to the Review Board, which made its recommendation on 25 June 1992.

5. Plea (3) is supposed to bear out his contention that essential facts were overlooked and clearly wrong conclusions drawn from the evidence. But it too is mistaken.

6. The complainant alleges that CERN consulted those who had never supervised his work and failed to consult those who had. In his submission the impugned decision was based on a recommendation by the division leader, thereby endorsing the opinion of the deputy leader, who had followed opinions expressed by seven officials, and he names them. He says that only one of them was ever his supervisor while he was on the staff. As a matter of fact that assertion seems to contradict what he says elsewhere, that another of the seven officials served as deputy to the official who was his group leader until May 1989.

7. Be that as it may, according to the rules on the procedure for review of indefinite appointments it is the candidates' division leaders who draw up their individual files. So it is hard to see how the recommendation by the complainant's division leader, which he based on recommendations by his deputy and by the group leader, can be unsound in itself. It may not concur with favourable assessments by people outside the Organization, but if the Tribunal gave those other assessments priority over the views of the complainant's own supervisors it would be going beyond the bounds of its own discretion.

8. Furthermore, the comments by those other people do not cover the same period as does the opinion of the division leader. They relate to 1988-90, the period to which the original decision of 24 October 1990 related, whereas the comments the complainant is objecting to relate to the later period covered by the "Indefinite Appointment Review 1992".

9. In any event the deputy to the division leader was merely following orders from the division leader to make up his mind independently by consulting those who had worked with the complainant from 1983 to 1991. So there is no reason to question his statement in his memorandum of 18 May 1992 that he had "discussed with Mr. Girod's direct supervisors" - four officials he names - "with his last Group Leader ... and with other Group Leaders and colleagues who followed his activities".

10. Even though, as the complainant says, only one of those officials was his first-level supervisor, most of those officials knew him well since they had given assessments of him in the past. They made further comment at the invitation of the deputy, who concluded in his memorandum of 18 May 1992:

"From all these discussions, there emerged a surprisingly homogeneous appreciation. Mr. Girod is considered to be an average mechanic, but requiring constant supervision, showing no initiative and little interest in personal development, and having an unsatisfactory working morale."

In thus reporting on his consultations the deputy did not overlook any essential fact or draw any mistaken conclusions from the evidence.

Plea (3) therefore fails.

11. In support of his contention that the impugned decision shows a mistake of law the complainant cites a statement he says the Director-General made to the Staff Assembly on 17 December 1990 that where the group leader and the division leader disagreed he would receive those concerned and in all such cases a decision would be held over and the case looked at again the following year. In the complainant's submission that amounted to a commitment to the staff.

The plea is unsound. This is not a case of disagreement between group leader and division leader. Moreover, any statement the Director-General may have made on 17 December 1990 is irrelevant to the procedure for review of indefinite appointments in 1992.

The execution of Judgment 1151

12. The complainant puts forward the subsidiary plea that CERN has failed to execute Judgment 1151 by paying

him only the amount of the provisional award.

13. He is right on that score. The Tribunal decided in Judgment 1151 to set aside the decision of 24 October 1990 not to renew his fixed-term appointment after 30 September 1991. That restored the status quo and in particular cancelled the notice of termination of his appointment at that date. Since he left CERN at 30 September 1991 and since by the decision of 29 July 1992 the Director-General again refused to extend his appointment, there must be final determination of his entitlements.

14. First, since he was not informed within the time limit in Staff Regulation R II 6.02 of the decision not to renew his appointment after 30 September 1991, he is to be deemed to be still under contract from 1 October 1991 up to the date of notification of the new decision of 29 July 1992, i.e. up to 10 August. There shall, however, be subtracted from his arrears of pay any unemployment insurance benefits he may have received, his terminal entitlements and the amount of the provisional award by the Tribunal. Moreover, the decision of 29 July 1992 ought, under Regulation R II 6.02, to have been notified to him six months before the expiry of his appointment. He is therefore entitled to an indemnity in lieu of the six months' notice, including social insurance coverage.

15. Since the complainant's claim to the quashing of the impugned decision fails so does his claim to moral damages. But he is entitled to payment of interest on the sums due and 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 29 July 1992.

2. CERN shall pay the complainant in accordance with Judgment 1151 his arrears of pay from 1 October 1991 to 10 August 1992 and compensation in lieu of six months' notice, less the sums already paid to him and referred to in 14 above, plus interest to be reckoned at the rate of 10 per cent a year from the date at which each payment was due up to the date at which it is made.

3. The Organization shall pay the complainant 2,000 Swiss francs towards costs.

4. His other claims are dismissed.

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.