

## TWENTY-SECOND ORDINARY SESSION

### Judgment No. 139

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Organization for Nuclear Research (CERN) drawn up by Mr. J. C. on 5 November 1968, the reply of the Organization dated 28 January 1969, the complainant's rejoinder of 25 April 1969 and the further reply of the Organization dated 5 June 1969;

Considering article II, paragraph 5 of the Statute of the Tribunal, Rule H 1/4 of the Staff Rules of the Organization (1967 edition), Rule 5.01(d) of Chapter II of the Staff Rules in force since 1 January 1968 and Annex S.A8 of the Staff Regulations;

After examining the documents in the dossier, oral proceedings having neither been requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. C. was appointed by CERN on 1 February 1955 as a Class II, Grade 3 Electrician for a period of three years. He was assigned first to the Linac Group and then, in March 1956, to the High Frequency Group. His work in the former did not give full satisfaction and his annual salary increment was withheld. The Organization was pleased with his work in the latter, however, and in 1957 he received a double increment. His contract was renewed for a further three years ending on 31 January 1961. At the end of December 1959 he was transferred to the Apparatus Layout Section (ALO), a section under the leadership of Mr. Bonaudi, engineer, which was responsible for the installation of experimental apparatus. On 16 October 1961 Mr. Germain, Director of the Proton Synchrotron Division (MPS), which comprised the ALO Section, proposed that the complainant should be given an appointment of indefinite duration. He received such an appointment on 6 February 1962 at Grade 8, Step 7. At the end of December 1961 he was granted an exceptional performance allowance. On 23 January 1962 his first job description was determined. On 18 February 1963, the Leader of the ALO Section having been detached to the United States was replaced by Mr. Gouiran engineer. The complainant's work was fully satisfactory and he was promoted to Grade 9 on 1 January 1964 by a decision communicated to him on 7 February 1964. He had disputes, however, with his new leader and some of his subordinates over the scope of his duties. On his own initiative and without consulting his immediate superiors, but at the request of Mr. Munday, Leader of the "Groupe Vide" in the EPS Division, the complainant submitted written proposals for the reorganisation of the ALO Section. In a memorandum dated 19 June 1964 Mr Germain, Director of the MPS Division, while recognising his proficiency at work, officially reprimanded him, not only for acting on his own initiative, but also for being difficult to get on with, too ambitious, insubordinate and unable to keep on good terms with his immediate colleagues. On 15 December 1964 his job description was revised and he was made Senior Technical Assistant. His immediate superior, Mr. Gouiran, was replaced by Mr. Danloy and then, in March 1965, by Mr. Geibel. His relations with his new chief were no better than with Mr. Gouiran and were aggravated when Mr. Geibel took over from him, in August 1966, certain responsibilities for work organisation. The following year Mr. Geibel had to leave his post temporarily because of an accident. The complainant allegedly sought to succeed him on the grounds that according to his job description he was responsible in his chief's absence for the co-ordination and actual performance of work in the experimental zone CERN rejected his request on the grounds that the Section should be directed by a science graduate who could speak on an equal footing to the visiting physicists who used the installations for experiments, and a physicist from another division was appointed acting Section Leader Having asked for a transfer, on 14 April 1967 Mr. C. was detached to the Nuclear Physics Division (NP) for a trial period of six months. At the end of this period the Director of the NP Division said that he could not keep him, since, although he had shown vitality, organising talents and supervisory ability, he did not possess all the technical knowledge required by the post and was not fully aware of his own limitations. On 25 August 1967 the Director of the MPS Division, to which the complainant was due to return, refused to take him back on the grounds that the ALO Section had worked much better without him. In the meantime his duties had been taken over by the leader and other members of the Section. On 24 November 1967 it was decided to suppress the post in accordance with Rule H 1/4 of the Staff Rules (Chapter II, section 5.01(d) of the Staff Rules in force since 1 January 1968).

B. In accordance with Chapter II, section 5.01(d) of the Staff Rules, which provides that the Director-General shall terminate an appointment because of suppression of post only if he is satisfied that the staff member concerned cannot be reassigned to another post at CERN, the Head of Personnel distributed a circular dated 1 December 1967 and addressed to all Department Directors and Division Chiefs at CEE; in which he inquired about vacancies suitable for the complainant. Having received several negative replies, he asked the complainant whether he would accept a post at a grade lower than Grade 9. The complainant refused as a matter of principle but was not opposed to attempts to find such a post. On 9 February 1968 the Personnel Division offered him a post in the Safety Group subject to six months' probation. Although, like the other posts in the Group, the post was Grade 8, it was understood that the complainant would continue at Grade 9 and at the same step as before, but could not advance further so long as the post continued to be Grade 8. On 15 February 1968 the complainant asked for information on the qualifications required for this post so as to enable him to reply. On 19 February 1968 he was told that the job qualifications had not yet been published and that no information was available. He was asked to reply not later than 23 February 1968; failing a reply he would be regarded as having declined the offer. Having received no reply, the Personnel Division informed him on 1 March 1968 that he was dismissed because of suppression of post. The letter of dismissal stated that he would receive six months' salary in lieu of notice and need not work at CERN for that period. He was then 47 years old and had completed thirteen years' uninterrupted service. He would therefore receive six months' salary corresponding to the period of notice, or Sw. fr. 23,502, 34 months' basic salary as an indemnity for suppression of post (provided for by Annex S.A8 of the Staff Regulations), and five months' basic salary as an additional indemnity, or a total of Sw. fr. 133,944. He also received Sw. fr. 65,521.65 from the Pension Fund (consisting of his own and CERN's contributions), his furniture removal expenses, the money equivalent of the balance of his annual leave, and travel expenses for his own and his family's repatriation. On 3 April 1968 the Director of the Administration Department informed the Contrôle de l'Habitant of the City of Geneva in writing that, having been dismissed with immediate effect, Mr. C. should surrender his identity card ("carte de légitimation") immediately; CERN hoped, however, that he might be allowed to stay in Switzerland if he wished until the end of the period of notice. The Contrôle de l'Habitant gave the complainant permission to remain in Switzerland. He protested, however, at this procedure and the Director of the Administration Department informed him that he was prepared to regard him as being on paid leave during the period of notice. Mr. C. asked to keep his identity card and requested an office at CERN where he could work on his internal appeal. He was refused the permit, but given an office as requested.

C. Mr. C. not accepting the decision to dismiss him, his complaint was submitted to the Joint Advisory Appeals Board. On 5 July 1968 the Board recommended the Director-General to extend the period of notice by one month to 5 October 1968 and to make a fresh attempt to find him a Grade 9 post. The Board held the suppression of post to be genuine, real and effective; in such circumstances a Division Director was certainly entitled with the Department Director's consent to suppress a post for valid reasons connected with the internal reorganisation of his division. The Board was nevertheless disturbed that evidence showed that Mr. C.'s dismissal had been contemplated even before as well as shortly after the suppression of his post. It considered his promotion to Grade 9 an extremely serious mistake - though of course not one of his own making - since he now held too high a grade and could not easily be transferred. The offer of a post in the Safety Group, moreover, should not have been made subject to such unfavourable conditions, the blocking of promotion being vexatious. Moreover, his candidature had not been formally submitted to all the selection boards for new vacancies at CERN. On 7 August 1968 the Director-General informed the complainant that the post in the Safety Group was no longer available and that there was no suitable Grade 9 post, but that an attempt would be made to find him another post as recommended by the Appeals Board. Any such post, however, would be Grade 8, Step 11. The dismissal notice was extended until 5 October 1968 and all Department Directors were invited by circular on 21 August 1968 to report vacancies in their departments. All replies were negative. In the meantime, by letter dated 28 August 1968 the complainant had warned the Director-General that he would refuse any post at Grade 8, Step 11. On 26 September 1968 the Director-General informed him that, having failed to find him any other assignment, he was confirming the dismissal on grounds of suppression of post; the complainant would receive his salary and allowances until 5 October 1968 and was free to leave from the date of receipt of the letter.

D. In his complaint contesting the Director-General's decisions of 7 August and 26 September 1968, Mr. C. requests the Tribunal to order the production of the minutes and papers which preceded and led to the notice of promotion to Grade 9 dated 7 February 1964, to declare unfounded the suppression of post MPS/mv/135 on 24 November 1967, to order his reinstatement at his former grade and in his former post or the payment of damages for his material loss due to dismissal, and to award him additional damages for the serious moral prejudices he had suffered because of the manner of his dismissal.

E. The Organization rejects these claims.

#### CONSIDERATIONS:

Under article II.5.01 (d) of the Staff Rules, the appointment of a staff member can be terminated, among other reasons, by "dismissal owing to suppression of post, when the Director-General has ascertained that the member of the personnel cannot be transferred to another post within the Organization". In the light of this provision, therefore, the severance of the employment relationship of a staff member is subject to two conditions: the suppression of the post which he held, and the impossibility of transferring him to another post.

As to the suppression of post:

1. The decision to suppress a post lies within the Director-General's discretion. It follows that the Tribunal will not interfere with such a decision unless it is tainted by procedural irregularities or by illegality or is based on incorrect facts, or unless essential facts have not been taken into consideration, or again, unless conclusions which are clearly false have been drawn from the documents in the dossier.

In order to meet the objection of abuse of authority, the decision must be justified in the interests of the service. Consequently it must have the lasting effect of reducing the size of the staff, that is to say the expenses of the Organization. It is not necessary, however, that the duties of the person holding the post should be abolished. They can be assigned to other staff members already employed, on condition that this is not merely a provisional measure and that it does not at the same time or within a short interval involve the appointment of a new staff member. On the other hand, if the Director-General suppresses a post and then re-establishes it soon after, there is reason to suppose that he was guided by reasons other than the efficiency of the administration, that is to say that he has abused his discretionary powers.

The suppression of a post is not tainted by such abuse when it is designed to have lasting effect in the interest of the service and at the same time terminates the appointment of a staff member whose services were unsatisfactory. It is true that the desire to terminate the contract of an unsatisfactory staff member is not in itself a ground for suppressing his post; that would mean depriving the staff member concerned of the legal remedies to which he is entitled, or at least, by disguising the true reasons for his termination, would make it difficult for him to defend his interests. If, however, the result of a suppression of post is to effect a permanent saving, it is not irregular simply because it also has the effect of removing an official.

2. The complainant, who entered the service of the Organization in 1955, rendered valuable service for several years, except for one period of reduced performance. His original temporary appointment was extended for an indefinite period. Moreover, after receiving an exceptional performance allowance he was promoted to Grade 9. From 1963 onwards, however, when he was working in the MPS Division, his relations with his chiefs and with some of his colleagues steadily deteriorated. All his chiefs, while recognising his professional competence, complained of his insubordination and excessive claims. In 1967 relations became so strained that he was detached to the NP Division for a period of six months which was subsequently extended. During that period his duties in the MPS Division were not entrusted to a new staff member, but were distributed between one of his chiefs, for the most part, and to a lesser degree other staff members. After several months the Chief of the WP Division refused to keep him permanently because he did not possess all the necessary technical knowledge and because of his lack of awareness of his own limitations. The Chief of the MPS Division, for his part, objected to the complainant's return to his former post, which he decided to suppress.

The above-mentioned facts show that the complainant's differences with his chiefs were the root cause of the suppression of his post. Such a measure might never have been even considered if the complainant's conduct had always been above criticism. It does not, however, follow that this is a case of abuse of discretionary power. On the contrary, trial of the arrangement for several months showed the expediency of distributing the complainant's duties among other staff members. This arrangement has continued ever since, and it has not proved necessary to appoint another staff member, this being explained, in particular, by the fact that the complainant's duties partly overlapped with those of one of his chiefs. It follows that in the case at issue the suppression of post was based on two grounds, one related to the person of the complainant, and the other to the interests of the service. It is clear from the preceding consideration that this second ground is sufficient to justify the decision taken in the circumstances of the case.

As to the grant of a new post:

3. Under article II.5.01 (d) of the Staff Rules, the suppression of a post entails the dismissal of its incumbent only if the Director-General has first endeavoured to find him another post in the Organization. This condition places obligations on the Director-General whose content must be examined further.

The Director-General is bound to inquire of all heads of service, without exception, about posts which are immediately vacant or will be within a period whose length depends on circumstances. As a general rule, he will continue consultations for some months before dismissing an official who has given the Organization fully satisfactory service over many years.

Inquiries will be made about all the posts which the incumbent of the suppressed post can fill satisfactorily and which are held by officials of his grade. If, however, the official is prepared to accept a post at a lower grade, the Director-General will broaden the scope of his inquiries. Since suitability for a post is a question of discretion, however, the Tribunal judges the Director-General's decisions according to the criteria applicable to the suppression of the post, as indicated in point 1 above.

Finally, the official who has worked for many years for the Organization to its full satisfaction is absolutely entitled to fill a post suitable to his abilities and grade in preference to any other candidate.

Only when he has made appropriate inquiries may the Director-General dismiss the incumbent of the suppressed post, in the following two cases: either when no post is available which meets the aforesaid conditions or when the official refuses the offer of such a post after being given a reasonable period of time to decide.

4. In the present case, once it had been decided to suppress the post, the Head of Personnel sent a circular dated 1 December 1967 to Department Directors and Heads of Division in which he inquired about the possibility of finding the complainant a new post. All replies were negative. On 9 February 1968, however, the Organization offered the complainant a Grade 8 post in the Safety Group. Under the terms of the offer, the complainant was to undergo six months' probation and, although he would continue at the same grade and step and would receive the same salary as before, he could not be promoted for as long as his post continued to be Grade 8. The complainant not having replied within the required period, the Organization dismissed him on 1 March 1968.

The complainant contested this decision, and the Joint Advisory Appeals Board was called upon to give an opinion. After a particularly thorough examination of the case, on 5 July 1968 the Board recommended the Director-General to make a fresh attempt to find the complainant a new post. On 7 August 1968 the Director-General informed the complainant that, since there was no suitable Grade 9 post available, he would try to find him a Grade 8 post at Step 11. Accordingly, on 21 August 1968 he sent all Heads of Department a second circular, which was no more successful than the first. On 26 September 1968 he therefore confirmed the decision to dismiss.

Contrary to what the complainant alleges, the Director-General fulfilled his obligations. Although he did not succeed in finding the complainant a new post, he took all the steps which might be expected of him. In particular, in taking once again in the summer of 1968 the steps he had already taken several months before, he took account of the complainant's long period of service and of the observations of the Board concerning the inadequacy of the first inquiry about vacancies. Moreover, in view of the criticisms levelled against the complainant's behaviour, the conditions attached to the offer of a post in the Safety Group must be regarded as reasonable. It may be that it was even more difficult to find a post suitable both to the complainant's qualifications and to his grade since his grade was generally considered to be too high for his qualifications. The Director-General cannot therefore be criticised for having tried, by means of a second inquiry, to find the complainant a post at a lower grade, namely at Grade 8, Step 11, instead of Grade 9. It follows that the Director-General was entitled to terminate the complainant's contract in accordance with article II.5.01 (d) of the Staff Rules. All the complainant's claims must therefore be dismissed, including those for the production of certain documents, since those documents cannot affect the Tribunal's decision.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and Mr. A.T. Markose, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 November 1969.

(Signed)

M. Letourneur  
André Grisel  
A.T. Markose  
Bernard Spy