

SIXTY-EIGHTH SESSION

In re ESPINOSA BLANCO

Judgment 1007

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. José Espinosa Blanco against the European Organization for Nuclear Research (CERN) on 30 November 1988 and corrected on 9 March 1989, CERN's reply of 16 May, the complainant's rejoinder of 14 June and CERN's surrejoinder of 22 August 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles II 6.01 and VI 1.01 of the CERN Staff Rules and Articles R II 6.07, R VI 1.01, 1.02, 1.05 and 1.13 and Article R B 2.07 of Annex R B 2 of the CERN Staff Regulations;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Spaniard born in 1932, joined the staff of CERN in Geneva in 1966 as a buyer in the Finance Division at grade 8. He was promoted to grade 9 in 1972, to grade 10 in 1978 and to grade 11 in 1982. On 1 April 1986 he was transferred to the Research Department at the same grade. He wrote the Director-General a letter on 26 June 1987 in which he said that his post was largely unsuited to his qualifications, which CERN no longer needed, and his duties took up only a fifth of his working time: he proposed that CERN end his appointment on grounds of abolition of post under Article II 6.01 of the Staff Rules; if it did, the last day of his employment would be 31 August 1988, but he wanted to be put on special paid leave for eleven months, from 1 October 1987 to 31 August 1988, in accordance with Article R II 6.07 of the Staff Regulations ("The Director-General may authorize or require a member of the personnel to take special paid leave during the period of notice"). In a letter of 17 July the Director of Human Resources agreed to his proposal; he was to be paid the terminal indemnities corresponding to grade 11, step 8. He signed on 6 August 1987 a personal action form putting him on special paid leave from 1 October 1987 to 31 August 1988.

Before the leave began the complainant said in a letter of 8 September 1987 to the Director-General that his outstanding services had earned him promotion to grade 12; if it was refused he wished to file an appeal under Articles VI 1.01 of the Staff Rules and R VI 1.01 of the Regulations. His appeal was referred to the Joint Advisory Appeals Board. In its report of 4 December 1987 the Board acknowledged that he had been active in keeping CERN on good terms with the Spanish Government but held that his services had been adequately rewarded by the grant of three additional salary increments in 1986 and 1987; it saw no reason to recommend promotion. By a letter of 19 January 1988 the Director of Human Resources sent him the Board's report and informed him that the Director-General had rejected his appeal.

In a memorandum of 1 March 1988 to the Director he said that the report was "insulting" and distorted important facts and he would take action if it was not corrected.

By a letter of 29 September to the Director-General he again asked that the report be corrected and he also objected to the decision not to promote him in July 1988. He said that, if his claims were rejected, his letter was to be treated as a new appeal. In a letter of 11 October 1988, the decision now impugned, a senior administrative officer pointed out on the Director-General's behalf that he had failed to say in what respects the report was insulting or wrong; besides, he had not lodged an appeal, as R VI 1.05 required, within sixty days of the expiry of sixty days' silence on the Administration's part after the date of notification to it of his memorandum of 1 March 1988.

B. The complainant submits that it was inadmissible of CERN, though it had not answered his objections to the Board's report, to declare his claim of 29 September 1988 out of time and irreceivable. Under Article R B 2.07 of Annex R B 2 to the Staff Regulations, which is headed "Appeals in connection with the classification of post and promotion", the time limit for an appeal against his grading in 1988 was 30 September 1988.

As to the merits, he gives a full account of his achievements and contends that the Director-General and senior officers led him to expect promotion and appointment as head of the Finance Division. When that fell through he tried, to no avail, to get proper recognition of his services. It was sheer frustration and a run of improper decisions leading up to the abolition of his post that made him go.

The Board's recommendation rested on mistakes of fact: in particular the increments were never intended as a reward for his services; staff with duties like his were all at grade 12 or even 13, and he had other responsibilities besides; and he stage-managed Spain's return himself under direct instructions from the Director-General.

He claims damages on the grounds of misrepresentations of fact in the Board's report and, if he is refused promotion or compensation, reinstatement and a further award of damages "for the injury sustained".

C. CERN replies that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal because the complainant has failed to exhaust the internal means of redress. Its letter of 11 October 1988 was not a final decision but just an answer to his letter of 29 September. It had notified approval of the Board's recommendation in its letter to him of 19 January 1988. If he wanted to challenge that decision under R VI 1.01 and 1.02 he ought to have respected the time limit in R VI 1.05: "Appeals shall be lodged within sixty calendar days of notification of the disputed decision". That time limit ran out on 19 March 1988 and his claim of 29 September 1988 was out of time.

R B 2.07, on which he relies, sets at 30 September of the current year the time limit for filing an appeal about grading or promotion. But his letter of 29 September 1988 was not a valid appeal, since it was to be treated as an appeal only if CERN refused his claim of 1 March 1988 to correction of the Board's report.

As to the merits, CERN submits that since he failed to explain, let alone substantiate, his allegations of misrepresentation, his claim to damages under that head is unfounded. His claim to reinstatement, besides being irreceivable because he has failed to exhaust the internal means of redress, is also unfounded: his allegations about improper decisions leading to the abolition of his post are groundless since he proposed the abolition himself.

D. In his rejoinder the complainant objects to CERN's arguments on receivability: he did challenge in time, on 1 March 1988, the decision based on the Board's misleading report, and the Organization did not deign to answer until he was forced to send a reminder in order to respect the time limit of 30 September 1988 in R B 2.07. He enlarges on his pleas on the merits and seeks to refute the Organization's, which he alleges are based on gross distortions of fact and on casuistry. He presses his claims.

E. In its surrejoinder CERN observes that the complainant's rejoinder puts forward no new pleas. It maintains that his complaint is irreceivable because he failed to file an internal appeal in time and that what he is challenging is not a final decision.

It further argues the merits of his various claims.

CONSIDERATIONS:

1. The date in each year at which the staff of CERN may be promoted as the result of an annual "staff review" is 1 July. By 1982 the complainant held grade 11. Having failed in July 1986 to obtain promotion in the staff review for that year, he was asked to draw up personal records for submission to the Organization. In June 1987 he suggested that CERN end his appointment on the grounds of abolition of post at 31 August 1988 and put him on special leave for the eleven months up to that date, and CERN agreed to that on 17 July 1987. Again in July 1987 he failed to get promotion, though he did get a salary increment.

2. In a letter dated 8 September 1987 to the Director-

General he objected to being denied promotion for his past services and asked that the decision be reconsidered or, failing that, that his letter be treated as an appeal against the decision in accordance with the CERN Staff Rules and Regulations and that the Joint Advisory Appeals Board be convened to hear his appeal.

3. That appeal of 8 September 1987, though processed, was unsuccessful: on the Board's recommendation the Director-General rejected it, as he was informed by a letter of 19 January 1988 to which a copy of the Board's report was appended. In a memorandum dated 1 March 1988 to the Director-General the complainant took issue

over the accuracy of certain aspects of that report and asked that they be corrected; if not, he reserved his rights.

4. In July 1988, while he was still on the special leave, he again failed to obtain promotion and on 29 September 1988 he wrote a letter to the Director-General to say that he noted from his pay-slip for July 1988 that he had not been promoted to grade 12. Then, referring to his memorandum of 1 March 1988, he observed that the Organization had made no inquiry into the accuracy of the Board's report. He asked that such inquiry be made, that the Director-General reconsider the matter and that any errors be corrected; but that, if that request was not accepted, his letter be treated as an appeal against the administrative decision. Again he cited the relevant Rules and Regulations and asked that the Appeals Board be convened, to be made up this time of impartial members.

5. It is his letter of 29 September 1988 that has caused confusion.

According to Article R VI 1.13 of the CERN Staff Regulations "Appeals in connection with the classification of posts and promotion shall be governed by" separate rules that appear in Annex R B 2. The paragraph of Article R B 2.07 of that Annex which is headed "Routing of appeals" reads:

"... In order to be considered, the appeal must be lodged after the end of the Staff Review has been officially notified and by 30 September of the same year at the latest. ..."

The appeal "shall be made in writing to the Director-General" and "shall be forwarded to the secretariat of the Board for action".

6. The complainant states in his letter of 29 September 1988 that it is an appeal against the decision not to promote him in July 1988. But the Organization took it to be an appeal against refusal to investigate and correct the 1987 report of the Appeals Board. By a letter of 11 October 1988, the decision impugned, a senior administrative officer writing on behalf of the Director-General, rejected the appeal as irreceivable. He pointed out that the complainant had made his first request for correction in his memorandum of 1 March 1988; that since the Director-General had failed to answer within sixty days after receipt of that memorandum, there was deemed to be refusal under Article R VI 1.05, second paragraph, of the Staff Regulations; that, again under R VI 1.05, he had had another sixty days to appeal against the implied refusal; and that his appeal, not made until 29 September 1988, was therefore out of time.

7. Both at the beginning and at the end the complainant's letter of 29 September 1988 has the same wording as the appeal he made in 1987 against the decision not to promote him in that year, save that he adds that the Appeals Board should this time have impartial members. His appeal in 1987 was treated as receivable.

8. The Tribunal holds that his letter of 29 September 1988 may be construed as an appeal against the decision in July 1988 not to promote him; that the Organization should have treated it as such when the complainant clarified its meaning in his pleadings in this case; and that the Director-General should therefore have forwarded it to the secretariat of the Joint Advisory Appeals Board.

9. In its reply to the complaint CERN persists in treating the letter as an appeal against implied rejection of his request for an inquiry into the accuracy of the Board's report and consequently as out of time.

It is mistaken. The appeal was against the decision not to promote him in 1988 that was communicated to him in his pay-slip for July of that year, which he actually refers to in his letter. The appeal was filed within the time limit in the Staff Regulations.

10. The Organization further argues that its own letter of 11 October 1988 did not constitute a final decision and cannot form the subject of appeal to the Tribunal, the internal means of redress not having been exhausted.

There is nothing in the terms of that letter to indicate that the decision was in any way provisional. The letter is written on the Director-General's behalf and explicitly states that the appeal is irreceivable. The plea fails.

11. The complainant's ancillary claims to an award of damages for the alleged falsification of facts in the Board's report and to reinstatement in the Organization are not receivable. Neither of those claims arises from the complainant's appeal in his letter of 29 September 1988.

DECISION

For the above reasons,

1. The Director-General's decision of 11 October 1988 is set aside and the case shall be forwarded to the secretariat of the Joint Advisory Appeals Board for action.
2. The complainant is awarded 500 Swiss francs in costs.
3. His other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner