

NINETY-NINTH SESSION

Judgment No. 2427

The Administrative Tribunal,

Considering the complaint filed by Mr G.B.P. against the European Organization for Nuclear Research (CERN) on 24 May 2004, the Organization's reply of 25 August, the complainant's rejoinder of 20 September and CERN's surrejoinder of 15 December 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Hungarian national born in 1974, joined CERN on 1 April 2003 under a three-year limited-duration contract as a Technical Engineer in the Information Systems Support (ISS) Group of the Engineering Support and Technologies (EST) Division. Within the Group he was part of the section responsible for providing support to the EST Division and to the Technical Inspection and Safety (TIS) Division. His appointment was subject to a 12-month probation period.

For the first few months of his appointment the complainant was assigned various tasks enabling him to familiarise himself with the activities of his section. CERN also enrolled him in its French classes, to enable him to meet the language requirements of his post. In July 2003 he began to work on the TIS database support project (hereinafter "TIS project"), which, according to the vacancy announcement for his post, was to be one of his main functions. In his mid-probation report, written in August 2003, his performance was deemed satisfactory and his Group Leader described him as a "very efficient, fast learner" who had adapted himself very rapidly to the new working environment.

During the second half of the complainant's probation period, his supervisors' opinion of the quality of his work changed. On 12 February 2004, at a meeting also attended by his immediate supervisor and the Human Resources (HR) Coordinator, the Group Leader informed him that his performance was unsatisfactory and that his functions would therefore be assigned to a colleague. The complainant was invited to submit his comments in writing. On the following day he met with the HR Coordinator to discuss, in particular, the possibility of an extension to his probation period. The complainant sent his comments to the Group Leader in an e-mail of 17 February.

In an attempt to find the complainant another position in the Organization, the HR Coordinator arranged an interview with the leader of the alarms service of the Technical Support Department, but the latter concluded that the complainant was not suitable for a position in his service.

The complainant received his end-of-probation report on 31 March 2004. His Group Leader stated that problems had arisen during the second half of his probation period, in particular regarding "[his] analysis of situations, communication of issues (being too detail-oriented rather than being able to present a satisfactory overview)" and regarding his involvement in the work of the team, which was deemed insufficient. The Group Leader also considered that in 12 months the complainant's skills in French had not evolved at all. He concluded as follows:

"At the end of the probation period, it is now clear unfortunately to the [...] Group management that [the complainant's] place is not in the Group. In order to allow him the time to look for other positions at CERN we suggest extending his probation by two months until 30.5.04."

In an e-mail of 20 April 2004 the HR Coordinator reminded the complainant that he had the right to reply to the comments made in his end-of-probation report and invited him to submit his views in writing. On 23 April the complainant informed the HR Coordinator that he did not intend to reply, because he considered that "a reply [...] would not result in any change in [his] situation". During April and May 2004 he applied unsuccessfully for several other positions in CERN.

By a letter of 29 April 2004, which constitutes the impugned decision, the Director of Finance and Human Resources informed the complainant that, by delegation from the Director-General, he had decided to accept his supervisors' proposal not to extend his contract beyond his probation period. Consequently, the complainant's appointment ended on 31 May 2004.

B. The complainant submits that the importance of rapidly acquiring a basic knowledge of French was not explained to him. He points out that he attended French classes for nine and a half months, not 12 months as indicated in his end-of-probation report, and that he passed the French exam he sat in December 2003 with a score of 64.5 per cent. However, he considers that for participation in the meetings he had to attend, a basic knowledge of the language would in any case be insufficient.

He asserts that he was never informed that his performance was unsatisfactory. Citing the case law, he states that an appointment cannot be terminated for unsatisfactory performance unless the staff member has received a clear warning leaving him time to improve. He adds that when an organisation assigns a new duty to a staff member, and particularly to a probationer, it can be expected to provide proper training. Nor did CERN apply its procedure for restoring performance, which is provided for in Administrative Circular No. 26.

The complainant draws attention to the fact that the evaluations of his performance were inconsistent. His end-of-probation report represented a "180 degrees turn" in relation to his favourable mid-probation report. This, he suggests, casts doubt on the validity of the impugned decision. He argues that the Organization has overlooked essential facts, particularly since his performance was evaluated in relation to tasks other than those which he was asked to carry out. Virtually all of his time was devoted to tasks other than the TIS project, in accordance with the instructions he received from his immediate supervisor, Mrs M.-P. Yet the evaluation of his performance was based on his work on that project. He considers that Mrs M.-P. in fact interfered with his work and did not allow him to work independently.

According to the complainant, the process of "eliminating" him had already begun prior to the meeting of 12 February 2004, since he had been asked by Mrs M.-P. to hand over all written materials concerning his main assignment – the TIS project – to the colleague who subsequently assumed his duties. Moreover, the comments he submitted following that meeting were simply ignored, whereas they ought to have been taken into account before the end-of-probation report was established.

The complainant asks the Tribunal to order CERN to compensate him for his losses by paying him the salary, allowances and pension contributions to which he would have been entitled during the 22 remaining months of his contract, less any unemployment benefits received to date. He also seeks compensation for moral injury and an award of costs.

C. In its reply the Organization, which emphasises the discretionary nature of the decision to confirm the appointment of a probationer, over which the Tribunal has a limited power of review, argues that the impugned decision was taken in accordance with its rules governing probation periods.

It observes that the vacancy notice for the complainant's post clearly indicated that a basic knowledge of French was required. Although CERN helped him to acquire that knowledge by allowing him to attend French classes throughout his probation period, he himself has acknowledged that his level of French was not sufficient to enable him to follow working meetings in that language, thus confirming the assessment made by his supervisors.

Regarding the alleged inconsistency of the complainant's performance evaluations, the Organization explains that during the first half of his probation period his tasks were essentially confined to familiarisation with the services provided and the tools used by his section. His work in that area was satisfactory, hence the favourable mid-probation report, but it did not require the analytical skills or the ability to work independently that were found to be lacking when, during the second half of his probation period, he began to work on the TIS project. Rejecting the complainant's argument that he was instructed to devote most of his time to functions other than the TIS project, CERN points out that the daily support tasks which he carried out were part of his duties as listed in the vacancy notice and did not prevent him from pursuing his work on the TIS project. It considers that it was the complainant's "lack of analytical and synthetical skill" that made the TIS work more time-consuming for him than it ought to have been.

CERN submits that the allegation that it failed to provide proper training is irrelevant, insofar as all the

complainant's duties corresponded to those listed in the vacancy notice, and he was therefore deemed to be qualified to perform them. It adds that the procedure for restoring performance provided for in Administrative Circular No. 26 is likewise irrelevant, since it concerns the decision not to award a step increment to an established staff member and is therefore not applicable to probationers.

Addressing the allegation that it failed to inform the complainant of the fact that his performance was deemed unsatisfactory, the Organization asserts that Mrs M.-P., who had regular meetings with him during the second half of his probation period, repeatedly warned him of this and made it clear to him that "appropriate corrective action" was required. Despite these warnings, the complainant's performance did not improve, and after ten months his supervisors reached the conclusion that he lacked certain personal skills that were essential to the performance of his functions. The arguments he put forward in his e-mail of 17 February 2004 were duly taken into account, but they contained no element that was liable to alter his supervisors' assessment of his performance.

D. In his rejoinder the complainant reiterates his arguments on the merits. He points out that the wording of his mid-probation report shows that the satisfactory evaluation also applied to the work he had already accomplished on the TIS project. He contends that CERN should have checked whether he had "the required personal skills at the selection board". He also contends that the Organization breached its rules governing probation periods by failing to conduct an induction interview when he took up his functions. The purpose of that interview, he submits, is to define the objectives and expected results of the probation period.

E. In its surrejoinder the Organization maintains the position set out in its reply. It attributes the absence of any specific criticism in his mid-probation report concerning his work on the TIS project to the fact that he had yet to produce any results, the project having only just begun. It acknowledges that no formal induction interview was held, but considers that the complainant's probation period was not flawed on that account. His objectives were communicated to him orally, and he clearly understood them since he actually carried out the tasks required of him, albeit unsatisfactorily.

CONSIDERATIONS

1. The complainant was hired under a three-year limited-duration contract which stipulated inter alia that his appointment was subject to a probation period of 12 months. The qualifications required for his post, as stated in the vacancy notice, included a "[g]ood knowledge of English or French" and a "basic knowledge of the other language or an understanding to acquire it rapidly". The Tribunal will return to this later, for it is an important part of the contentions of both parties in this case.

The complainant was evaluated positively in his mid-probation period report, but soon after a consensus emerged amongst his supervisors – of which he was aware – that his performance was unsatisfactory and that he was not suitable for the post. At the end of his probation period, he was formally informed of this and given a two-month extension of the probation period to allow him to try and find another position.

He claims payment of the salary and emoluments he would have received had the contract been continued, as well as moral damages and costs.

2. According to the case law, to which the complainant refers extensively, the Tribunal is competent to review the lawfulness of any decision by the Director-General to terminate a staff member's probation. In particular, it may determine whether that decision is based on errors of fact or law, or whether essential facts have not been taken into consideration, or whether clearly mistaken conclusions have been drawn from the facts, or, lastly, whether there has been an abuse of authority. The Tribunal may not, however, replace with its own the executive head's opinion of a staff member's performance, conduct or fitness for international service (see Judgment 318, considerations).

Other cases mention, as further grounds on which the Tribunal will review such decisions, a formal or procedural flaw, or lack of due process (see, for example, Judgments 13, 687, 736, 1017, 1161, 1175, 1183 and 1246) which, it has been noted, must be substantial to invalidate an end-of-probation termination decision.

3. Administrative Circular No. 2 (Rev. 1), entitled "Guidelines and Procedures concerning Recruitment and Probation Period of Staff members", contains a self-explanatory and very demanding clause about "suitability"

(Article 12.1) of prospective employees of the Organization. To mention just one of the requirements, candidates considered for fixed-term contracts should have “passed the basic level of their career path and [be] capable of making a significant medium to long-term contribution to the Organization in various potential assignments. To this end, they must be measured against additional criteria such as performance, initiative, acceptance of responsibility and long-term professional potential”. Also, the vacancy notice for the complainant’s post expressly stated that the incumbent was to work in a “flagship project” of the Organization. The challenge that the job implied was thus obvious for anyone.

4. The complainant criticises the Selection Board for having chosen him even though it knew that he did not speak French. The Board’s expectation, as he himself points out, was that he would be a fast learner, which is precisely what the vacancy notice stipulated: “Good knowledge of English or French; basic knowledge of the other language or an understanding to acquire it rapidly”. The complainant denies that the importance of acquiring rapidly a basic knowledge of French was clearly explained to him, but his denial fails to take into account that even the vacancy notice was unambiguous in that regard. The Tribunal finds, from the evidence on file, that he was sufficiently warned, at the beginning of his probation period and later on, about the language requirements for his post. It is clear, and the complainant admits, that his knowledge of French did not improve enough to enable him to participate in meetings, right to the end of his probation period. That alone constitutes sufficient cause for his negative end-of-probation report. Such cause, and the resulting termination of his appointment, could not possibly have surprised him.

5. As the complainant points out, his first performance appraisal, after six months of service, was positive and encouraging, although it probably should have included some words of warning, since he apparently did not heed the concerns raised by his supervisors. On 12 February 2004 he was officially informed of the consequences of his unsatisfactory performance.

6. When he was notified on 31 March 2004 of his negative end-of-probation report and invited to comment on it, he declined to reply and admitted that he had been informed previously of the negative evaluation of his performance. From his own account in his submission, he could not possibly have been unaware of it.

7. The conclusion is that the Organization acted reasonably in taking the impugned decision, which is not tainted by any flaw. The complainant has not established that he suffered moral injury warranting compensation. His claims must therefore be rejected.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

