

SIXTY-NINTH SESSION

***In re* CHAINTREUIL, CHETCUTI,
DEROSIAUX, GOMINET and THEROND**

Judgment 1054

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Georges Chetcuti against the European Organization for Nuclear Research (CERN) on 28 July 1989 and corrected on 30 August, CERN's reply of 1 November, the complainant's rejoinder of 8 January 1990 and the Organization's surrejoinder of 26 February 1990;

Considering the complaint filed by Mrs. Aimée Gominet against CERN on 28 July 1989 and corrected on 7 August, CERN's reply of 9 October, the complainant's rejoinder of 29 December 1989 and the Organization's surrejoinder of 26 February 1990;

Considering the complaints filed by Mr. René Chaintreuil, Mr. Michel Derosiaux and Mr. André Pierre Théron against CERN on 24 August 1989, CERN's replies of 28 October 1989, the complainants' rejoinders of 4 January 1990 and CERN's surrejoinders of 26 February 1990;

Considering CERN's further submissions of 2 March 1990, the complainants' observations thereon of 16 March and CERN's final submissions of 11 April 1990;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has asked for;

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

A. At its 85th Session, on 23 and 24 June 1988, the Council of CERN approved a new scheme for "early departures" as part of a policy for restructuring the staff that a review committee had recommended.

The complainants, who are members of CERN's staff, applied for such early departure: Mr. Chetcuti did so on 12 July 1988, Mr. Chaintreuil on 22 July, Mr. Théron on 26 July, Mrs. Gominet on 9 August and Mr. Derosiaux on 6 September. For the purpose they filled up application forms. Each form was in five parts. Part IV was to be filled up by the "division leader" and Part V, according to the applicant's grade, by the Director of Human Resources or the Director-General. By an announcement issued on 20 September 1988 the Organization informed the complainants and indeed the staff as a whole of the arrangements for applying the scheme. Paragraph 7 read:

"The Management's decision to accept, postpone or reject applications will be taken in accordance with the budgetary limitations and the number of cases fixed by Council; due consideration will also be given to divisional and managerial priorities, based on the interest of the Organization. In the event of a negative decision, the individual will be informed of the reasons in writing. ... The Director-General has sole competence to determine whether a resignation is in the interest of the Organization. There will be no right of internal appeal against the decision of the Director-General."

In letters of 22 December 1988 the Head of the Personnel Division told the complainants that after thorough study of each case and because of the limitations of the scheme their applications had been turned down. In January 1989 all the complainants but Mrs. Gominet wrote to the Director-General asking that they be informed of the reasons in writing, as the announcement of 20 September 1988 had promised and shown copies of their application forms. The Head of the Personnel Division answered in letters of 28 February 1989 that the Administration did not deem their departure to be in CERN's interests: it had carefully gone over each case and taken account of the arrangements for the scheme, which limited the number who could go and the amount of funds available for the

purpose and which required the consent of both parties, and of the complainants' own duties and responsibilities. He invited each of them to get in touch with his division leader if he wanted to know more of the reasons and to see his application form. On the same day Mrs. Gominet appealed against the decision of 22 December 1988 on the grounds that the reasons given for the refusal of her application were vague and insufficient.

Meanwhile the other four complainants tried again to get a written statement of the reasons.

Mr. Chetcuti's division leader wrote him a memorandum on 13 March 1989 pointing out that just over 200 had had to be chosen from among 543 applicants and that since the work he was doing was essential to the proper running of the division it would not be in CERN's interests to let him go. Moreover his division leader had found no evidence in his records of any medical justification for doing so.

The leader of Mr. Chaintreuil's and Mr. Derosiaux's division told them in letters of 28 April 1989 that the reasons had already been conveyed to them in the letters of 28 February. On being shown copies of their application forms they and Mr. Théron found that Parts IV and V had been left blank.

All but Mr. Chaintreuil had a talk with their division leader. Believing that their requests for explanation had not been met they lodged appeals with the Director-General at dates from 2 March to 5 June 1989. By letters bearing dates from 28 April to 22 June the Head of Administration informed each of them that their appeals were not receivable. In his letter to Mrs. Gominet he also repeated the terms of the letters he had written the other four on 28 February.

B. The complainants maintain that the Organization acted in breach of the principle of equal treatment. Their records were not properly considered and it is likely that they were deliberately left out for want of written comments on their applications. They submit that the reasons given in the decisions of 22 December 1988 and the explanations they got later do not make it clear what criteria the Director-General applied in exercising his discretion to turn them down, and they infer that the Organization did not show good faith.

Mrs. Gominet further argues that there can be no valid financial reasons for refusing her application since her departure would have made for savings by allowing the recruitment of someone younger. In her submission the scheme constitutes abuse of the procedure for dismissal on the grounds of abolition of post. She produces the text of a letter her supervisor, the Chairman of the Staff Association, wrote on 23 June 1989 to the Head of the Personnel Division to say that he was quite in favour of her early departure.

Mr. Chetcuti submits that the reasons he was given - the need for the work he was doing and the lack of medical justification - are unsound. His immediate supervisors do not accept the former nor the medical service the latter. As for the alleged financial constraint, the amount of his termination grant would have been set off by the recruitment of younger and less costly staff.

Each of the complainants seeks the quashing of the decision of 22 December 1988 refusing his or her early departure and an award of costs.

C. The Organization replies that in taking the impugned decisions it acted *intra vires* and complied with the formal and procedural rules. It has discretion to accept or refuse applications, even though in exercising its authority it must abide by the arrangements laid down for the scheme. The complainants are mistaken: though their forms were not completed their applications did go through the procedure prescribed in the staff announcement of 20 September 1988.

There was no breach of the principle of equal treatment. Though anyone may apply for early departure there is no right to it. There were three criteria: the consent of both sides, CERN's functional needs and the amount of funds available. The complainants' applications were refused because each was thought to have a weaker claim than those who were allowed to go.

The Organization showed good faith: each case was given proper thought and none of the complainants may rely on any promise or legitimate expectation as to the outcome. The scheme is not a covert method of dismissal and so does not, as Mrs. Gominet makes out, amount to any abuse of procedure: its purpose is to safeguard functions essential to the Organization, raise standards of personnel management and bring down the average age of staff, and anyway it requires agreement between both sides.

As for Mrs. Gominet, the Chairman of the Staff Association told the Head of the Personnel Division that if she left someone would have to replace her. According to a letter the Head of the Division wrote to the Chairman on 7 July 1989, that was why "they agreed not to grant [Mrs. Gominet's] application".

D. In their rejoinders the complainants seek to refute the pleas in the Organization's replies. They believe that the poor state of their health was one good reason for letting them go. In their submission the standard letters of 22 December 1988 were not in keeping with the spirit of the staff announcement of 20 September 1988 and the Organization exercised its discretion arbitrarily. It did act in breach of the principle of equal treatment in that two of the criteria, CERN's functional needs and the availability of funds, were invalid. In support of their plea of breach of good faith they again allege that their records were not even examined. Mrs. Gominet presses her contention that there was abuse of procedure.

Each of the complainants claims 5,000 Swiss francs in costs and makes a subsidiary claim to the holding of an inquiry by the Tribunal.

E. In its surrejoinders CERN objects to the complainants' pleas in their entirety. It maintains that each case was looked at carefully and each decision was properly explained. The reasons were that their departure would have failed to satisfy the priorities of its policy and it could not do without them. The state of their health is beside the point since that is not a relevant criterion in considering applications for early departure but a matter covered by special provisions of the Staff Regulations and Staff Rules. The complainants were treated in the same way as any other applicant and all the material records were taken into account.

F. In its further submissions CERN again explains its reasons for refusing the complainants' applications.

G. In their further observations the complainants maintain that CERN gives no specific reasons for having refused their applications but just refers again to the broad criteria mentioned in its replies.

Mrs. Gominet also points out that it is only from the Organization's pleadings on her complaint that she has found out about the letter the Head of the Personnel Division wrote to her supervisor.

H. In its final submissions CERN seeks to show that the complainants' objections are unsound.

CONSIDERATIONS:

1. The complainants, who are on the staff of CERN, are at odds with it over its refusal to let them benefit under the "early departures scheme" its Council approved in June 1988.

2. Since the five cases are the same in substance they are joined, although facts peculiar to any one of them will be mentioned in context.

The background

3. In 1986 the Council set up a committee - the Agram Committee - to review the Organization's record of achievement and outlook and to make proposals for structural reform. The committee reported to the Council at its meeting in December 1987. It said that the administrative structure failed in many ways to allow for the change and adaptability CERN would need to carry out its scientific work; there were too many permanent employees, who should be brought down from 3,450 to 3,085; the career structure and pay scales were too rigid; and the presence of too many older employees would prevent the steady lowering that was needed in the average age of scientific staff.

4. One of the committee's recommendations was to broaden the existing scheme for early retirement and so at once dispose of 300 staff.

5. The Council agreed, and so the Management Board of CERN issued on 20 September 1988 an announcement headed "The Early Departures Scheme". The announcement set out the arrangements, was sent to everyone who was nearing retirement, and offered termination grants as incentives for taking early retirement. Among other things it said:

(a) that the payment of the grant would depend on agreement between Management and staff member;

(b) that applications for early retirement would be accepted "in accordance with budgetary limitations and the number of cases fixed by Council" and with due regard to the Organization's interests and priorities, and that the Director-General had sole discretion to determine what they were; and

(c) that anyone who had his application turned down would be told the reasons in writing and might follow the mediation procedure provided for in the Staff Rules and Regulations, though no internal appeal would lie against the Director-General's decision.

Decisions on applications would be taken in the chronological order of the dates at which people wanted to leave.

6. There was an application form to be filled up. It was in five parts: I. personal data to be given by the applicant; II. a section on the period of service and on the amount of the grant, to be filled up by the "co-ordinator"; III. a cost-efficiency estimate; IV. a part to be filled up by the "division leader"; and V. a part for the Director of Human Resources or the Director-General to complete. In IV and V the division leader and, according to the applicant's grade, either the Director of Human Resources or the Director-General himself were to say whether or not they approved the application or were in favour of keeping it in abeyance and to give their comments.

7. The offer aroused unexpected interest: though the Council had authorised only 210 early departures there were 543 applicants. Over 300 being doomed to failure, the scheme rankled among the staff, the more so because the mediators CERN had named put out a statement on 6 February 1989 that because the issue was a general one they could not properly act.

8. On 22 December 1988 the complainants each got a letter in similar terms from the Head of the Personnel Division about the scheme. The crux of it was:

"I am writing to inform you on the Director-General's behalf that we cannot allow your application. Our decision has been reached after thorough study of your case and because of the limitations of the scheme."

9. The decisions prompted correspondence in much the same terms between the complainants and the Management, and the upshot was that they asked the Management to tell them the reasons and let them have copies of the application forms showing parts II, III, IV and V filled up.

10. The Head of the Personnel Division answered on 28 February 1989 that their early departure had not been "deemed to be in the Organization's interests" and that they might get from their division leaders further details of the reasons and copies of the application forms.

11. The evidence shows that approaching their division leaders secured nothing but confirmation of what the Head of the Personnel Division had already told them. Those who did manage to get copies of the forms found that parts IV and V, which were supposed to state the views of the division leader and the Director of Human Resources, were blank and that the Director had not signed them.

12. The complainants submitted claims to the Director-General at dates that ran from 28 February 1989 in Mrs. Gomet's case to 5 June in Mr. Derosiaux's, and they got similar answers at dates ranging from 28 April to 22 June 1989. The answers were sent by the Head of Administration on the Director-General's behalf and, after citing the earlier replies from the Head of the Personnel Division, said that no appeal would lie.

13. The complainants thereupon filed complaints at dates from 28 July to 24 August 1989 and there is no objection to receivability.

14. The complainants' main plea is that they were given no reason whatever for the decisions. They reject the Organization's contention that there was thorough study of their applications, and they say that what they were told failed to explain why CERN had allowed some applications and rejected theirs. They allege breach of good faith and the principle of equal treatment. Of their own accord they have all entered certificates to show that they were in poor health and they maintain that that was a reason to let them leave early. They seek the quashing of the decisions to refuse their applications and awards of 5,000 Swiss francs each in costs.

15. The Organization retorts that it had wide discretion in the matter and exercised its authority with due regard to set priorities, to its own interests as objectively determined and to programme requirements. Such were the criteria

against which it studied the applications and there was review right up to the top rank of the Management. It acted neither arbitrarily nor in breach of good faith and equal treatment.

16. It adds that what the complainants say about the state of their health is immaterial: on that score they come under the provisions of the Staff Rules and Regulations on disability.

17. Before the Organization filed surrejoinders the Tribunal asked it for fuller submissions on the reasons for its decisions and on what it had said by way of explanation to each of the complainants. In its further submissions the Organization does no more than cite its earlier pleas on the requirement of agreement, its own interests and budgetary constraints. Only in Mrs. Gominet's case does it explain that she holds a post with the Staff Association that has to be permanently filled and that there is no urgency about putting someone younger on it.

18. The Tribunal invited the complainants to comment on CERN's replies to its questions, and the comments may be summed up as follows.

Mr. Chaintreuil asked his division leader for a written explanation of the kind the announcement of 20 September 1988 had promised. He was merely referred to the letter from the Head of the Personnel Division and so he sought no interview.

Mr. Derosiaux saw the same division leader, who, he says, was uninformed. In the end he got the same written reply as Mr. Chaintreuil.

Mr. Théron was told that CERN wanted to keep him on because of his qualifications in cryogenics. He says he does not understand that explanation: three engineers in that field had their applications accepted.

According to Mr. Chetcuti his division leader just told him how hard it was to pick just over 200 out of 543 applicants and confirmed that the work he was doing was essential to the division's efficiency.

Mrs. Gominet declares that not until she got CERN's brief did she learn that the Head of the Personnel Division had discussed her fate with the Chairman of the Staff Association she worked for and that they had seemingly disagreed on whether to do away with her post. She points out that CERN has not answered the Tribunal and said where the Chairman of the Staff Association ultimately stood on that issue.

The merits

19. A preliminary point is that the complainants' plea about their health is unsound. As the Organization observes, the state of their health is an issue that is irrelevant to the scheme and they are subject to the rules on disability as determined by medical findings.

20. Their main plea - that they were given no reasons for the decisions - will be taken up before their arguments that CERN acted in breach of equal treatment and good faith.

21. The announcement of 20 September 1988 promised that anyone who was refused early departure would get a written explanation, and CERN thereby acknowledged a cardinal principle of administrative law, which is that there is an obligation on the decision-maker to be able to state on request the reasons for his decision. The staff member needs to know the grounds for the decision so that he can defend his rights and interests: a proper explanation of decisions on matters of staff policy is the sine qua non of trust between employer and employees. What is more, the reasons need to be known for the purposes of judicial review: the court cannot rule properly if it is kept in the dark about the true reasons for the decision impugned.

22. The substance of the obligation will vary with circumstances. It will not be the same when the decision is general as when it is individual; when management has some degree of discretion as when its authority is circumscribed; when the decision may be adverse as when it is, as here, intended to bestow a benefit.

The content of the obligation may further depend on the number of staff concerned: management cannot be expected to give everyone a particular and circumstantial explanation when its decisions affect many.

23. In these cases the burden of CERN's obligation was at its lightest since the benefits of early departure were conferred ex gratia and the purpose of the scheme was to meet a need for structural reform which the Organization

is the sole judge of. Yet it did not discharge even that minimal obligation. And its omission is compounded by its failure to keep its explicit promise to give every unsuccessful applicant a written explanation, by its declaration at the outset that no internal appeal would lie, and by the breakdown of mediation.

4. There are two points. The first is that the Organization failed to state in the administrative proceedings, in its pleadings and even in answer to the specific questions the Tribunal put to it, what the "priorities" it has constantly spoken of amount to in practice. Assuming that CERN policy has been consistent there ought to have been no difficulty over its setting out the criteria by which it allowed some applications and discarded others. Had it made the criteria known, even in general terms, it would have afforded the many unsuccessful applicants a tenable explanation and might, by dint of even that modest display of openness, have soothed discontent over its policy.

5. The second point is this. The evidence reveals that the Management took a rather easy-going approach to administering a scheme that nevertheless put a heavy load on its budget. High-ranking management officers and division leaders alike were unable to give the complainants any consistent account of the reasons for the decisions and how their own applications had been dealt with in the context of broad policy.

26. Being unable to rule properly on the cases before it and so perform its function of resolving dispute within an organisation, the Tribunal cannot but declare unlawful the decisions impugned by Mr. Chaintreuil, Mr. Chetcuti, Mr. Derosiaux and Mr. Théron. Only in the case of Mrs. Gominet can any understandable reason be discerned, namely the wish to keep her on a post that CERN saw as essential because it served to safeguard staff interests.

27. Quashing the four decisions mentioned above would serve no useful purpose since the quota for the grant of early departures has been filled. According to the second sentence of Article VIII of its Statute, the Tribunal may, if the rescinding of an unlawful decision is not possible or advisable, award the complainant compensation for injury. The Tribunal rules accordingly and holds that Mr. Chaintreuil, Mr. Chetcuti, Mr. Derosiaux and Mr. Théron will get fair redress in an award of 1,000 Swiss francs each in damages.

28. Since those complainants have won their case each is entitled to an award of costs which the Tribunal sets at 1,000 francs. Mrs. Gominet is also awarded that amount because she did not find out the real reasons for the decision she impugns until CERN answered her complaint and she may not be taken to task for having filed it.

DECISION:

For the above reasons,

1. The European Organization for Nuclear Research shall pay Mr. Chaintreuil, Mr. Chetcuti, Mr. Derosiaux and Mr. Théron 1,000 Swiss francs each in damages for the injury caused by the decision each of them impugns.

2. Each of the complainants, including Mrs. Gominet, is awarded 1,000 Swiss francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner