

**SEVENTY-SIXTH SESSION**

***In re* MERMIER (No. 2)**

**Judgment 1332**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Noël Mermier against the European Organization for Nuclear Research (CERN) on 18 December 1992, CERN's reply of 22 March 1993, the complainant's rejoinder of 29 April and the Organization's surrejoinder of 2 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations R II 1.19 and R II 6.02 of the CERN Staff Rules and 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. Facts material to this case and an account of the complainant's career appear in Judgment 1185 of 15 July 1992 under A. His first complaint, on which that judgment ruled, challenged a decision of 9 July 1991 not to grant him an indefinite appointment or renew his fixed-term one. The Tribunal set that decision aside, sent the case back to the Organization for review of his claims and made him a provisional award of an amount equivalent to three months' remuneration "pending final settlement".

On 28 July 1992 the complainant sent a letter to the Director-General in which, inferring from the judgment that he was still a staff member pending a new decision, he asked what the procedure would be for the review of his case.

The Director-General answered on 31 July 1992 that the Tribunal's ordering review of his contractual status did "not mean reinstatement in the meantime as a staff member" and the Personnel Division would be informing him as soon as possible of the procedure for review.

On 20 August 1992 he was paid the three months' compensation and the costs awarded by the Tribunal.

In a memorandum of 23 September 1992 the Leader of the Personnel Division recommended against renewing his fixed-term appointment.

In a letter of 29 September 1992 the Director-General informed the complainant of the decision not to grant him an indefinite appointment and not to renew his appointment that had expired on 31 January 1992. Appended to the letter was a note of 21 May 1991 from the Leader of the ST Division, in which the complainant worked, saying that his performance failed to meet three of the four main criteria stated in Administrative Circular No. 9. The Indefinite Appointment Review Board had approved the note on 5 July 1991 and confirmed its view on 18 September 1992.

The Director-General's letter of 29 September 1992 is the decision under challenge.

B. The complainant submits first that the decision was unlawful. It was founded on the note which the Leader of the ST Division wrote on 21 May 1991 for the previous indefinite appointment review. Although the Tribunal did not explicitly say so, the review of his case plainly required resuming the procedure from the start. Yet he had no interview with the leader of his division and was not told of the proposed recommendation before it went to the Indefinite Appointment Review Board. Furthermore, the impugned decision was taken long after July 1992, when the Board was due to complete the review.

Secondly, the complainant contends that Judgment 1185 was not properly executed. As in 1991 the Organization again failed to explain why it was not renewing his appointment, though the judgment was clear on that score. The

Tribunal also said that CERN was to "review ... the complainant's claims", which meant re-examining all the evidence available in July 1991. It did not do so.

He presses the pleas he put forward in his first complaint. The review of his case was premature: according to CERN practice indefinite appointments are not granted to anyone with less than the nine years' service mentioned in paragraph 2 of Regulation R II 1.19. His supervisors found his work satisfactory, as was plain from his division leader's opinion of 22 August 1990. But on 21 May 1991 the division leader made a "sudden switch" in the course of the review for 1991 after the complainant sent him a memorandum refusing for reasons of safety to perform certain duties.

CERN has in this case made the same allegations of failure to meet the criteria in circular No.9 as those that prompted the decision of 9 July 1991. The decision of 29 September 1992 amounts to abuse of authority because the Director-General has overlooked the arguments in his memorandum of 7 December 1990. It also amounts to a sanction.

Under Regulation R II 6.02 CERN must give at least six months' notice of non-renewal of a fixed-term contract. The complainant got no such notice.

He presses all the claims he made in his first complaint and asks the Tribunal to quash the decision of 29 September 1992, order his reinstatement as from the date of expiry of his appointment and award him a fair sum in damages for material and moral injury, payment of interest on the amounts due and costs.

C. In its reply CERN submits that the complainant's pleas are devoid of merit.

It denies that the decision of 29 September 1992 was unlawful: it did review the complainant's case as ordered in Judgment 1185 but since there were no new facts it had no choice but to cite the reasons underlying its decision of 9 July 1991.

The argument that it failed to observe the date for completion of the indefinite appointment review for 1992 is irrelevant: Judgment 1185 was delivered on 15 July 1992 and so it carried out the review within a reasonable period.

All the authorities competent to review his case stated reasons for not renewing his fixed-term appointment. So the procedure was in line with the Tribunal's ruling.

The complainant is misreading Regulation R II 1.19: it does not preclude the award of an indefinite appointment to someone with under nine years' service.

He is wrong to accuse the division leader of a "sudden switch": the leader based his view on - among other things - two refusals by the complainant of work assignments towards the end of 1990.

It is the decision of 29 September 1992 that is at issue, not the one of 9 July 1991. The pleas the complainant put forward in his first complaint are immaterial to this one because CERN did carry out a review.

There was no abuse of authority and the refusal to grant him an indefinite appointment or renew his fixed-term appointment was no sanction. His performance was found to be below par and by twice refusing jobs he marred the atmosphere at work.

As to his claim to moral damages, CERN paid him unemployment benefit in accordance with the rules and helped him to look for other employment.

CERN did give him notice, on 9 July 1991, that it would not extend his appointment beyond 31 January 1992, and since the decision of 29 September 1992 merely confirmed the reasons for the earlier one there was no need to give him notice. So his claim to damages under that head is unfounded.

D. The complainant submits in his rejoinder that even if the decision of 29 September 1992 was lawful Judgment 1185 was not properly executed. The Tribunal thereby held that he was entitled to compensation equivalent to the salary due from 31 January 1992 to 30 September 1992, the date of the final settlement. Compensation for the six months' notice prescribed in Regulation R II 6.02 should have been added to those eight months, but was not.

Although there were only facts prior to 31 January 1992 for CERN to consider in reviewing his case that was because by refusing to extend his appointment beyond that date it allowed itself no time for the review. What is more, it does not deny that there was no further discussion between him and his supervisor.

As for the allegation that the pleas in his first complaint are irrelevant to the second one, the decision of 29 September 1992 was taken for the same reasons as the earlier one.

CERN's efforts to find him a new job were not a favour but a right.

Lastly, he maintains that CERN failed to give him the six months' notice and that it began on 29 September 1992, the Tribunal having quashed the earlier decision.

E. In its surrejoinder CERN asserts that it made the complainant all the payments ordered in Judgment 1185 and does not owe him compensation equivalent to his pay from 31 January to 29 September 1992.

CERN presses its plea about notice and submits that it was under no duty to extend his fixed-term contract to allow time for review of its refusal of an indefinite appointment.

#### CONSIDERATIONS:

1. CERN used to employ the complainant in its ST Division as an electricity technician at grade 7. By Judgment 1185 of 15 July 1992 the Tribunal set aside a decision of 9 July 1991 neither to grant him an indefinite appointment nor to renew his fixed-term one from 31 January 1992. The Tribunal sent his case back to the Organization for review. Since he had to leave CERN at the end of the last extension of his appointment, at 31 January 1992, the Tribunal ordered the Organization to pay him a provisional award of an amount equivalent to three months' remuneration pending final settlement.

2. In answer to a request the complainant had put on 28 July 1992 the Director-General said that he had told the Personnel Division to execute Judgment 1185. By a memorandum of 8 September 1992 the Leader of the ST Division suggested upholding the decision neither to renew the complainant's appointment nor to grant him an indefinite one. In a memorandum of 18 September 1992 the Convenor of the Indefinite Appointment Review Board told the Director-General that the Board was confirming the recommendation it had made in 1991. The complainant is impugning the Director-General's decision of 29 September 1992 to endorse that recommendation.

#### The alleged procedural flaws

3. In the complainant's submission the serious procedural flaws in the decision of 29 September 1992 are that CERN failed to "review" his case: he had no "further conversation" with the leader of his division and he was not asked to comment on the outcome of the review.

4. The plea fails. For one thing, it is an irrelevant question for him to ask exactly how far the review by CERN was supposed to go after the quashing of the decision of 9 July 1991. What is beyond question is that the Organization was required to take a new decision on his claims as they were up to the date of the quashed decision. So CERN had to consider the question of granting him an indefinite appointment in 1991 in keeping with the set procedure. As set out in CERN's weekly news bulletin 10/91 of 4 March 1991 that procedure did not require any meeting between candidates and their division leaders. So there was no breach of the review procedure for 1991.

#### The alleged breach of good faith

5. The complainant charges the Organization with refusing to extend his appointment despite his supervisors' favourable assessment of his performance.

He contends that the Director-General's announcement of 17 December 1990 was tantamount to a promise which good faith required him to keep.

6. The sole purpose of the Director-General's announcement to a staff assembly on 17 December 1990 was to notify the individual decisions he had taken earlier, including the one of 22 October 1990 about the complainant's case and the postponement of other cases to 1991. The only promise he then made was to review those cases in 1991, and in respect of the complainant, whose case was reviewed in that year, he kept it.

The alleged disregard of essential facts and misappraisal of the facts

7. The complainant alleges that CERN overlooked several essential facts: the opinion of his first-level supervisor, which CERN discarded in favour of the inconsistent appraisals of the leader of his division; his eight years' fine service, which earned him two promotions and two extensions of appointment; and his actual working conditions as described in his memorandum of 7 December 1990.

8. The complainant's objections have more to do with appraisal than with any disregard of the evidence. The leader of his division went into all of those facts in the note which he wrote on 21 May 1991 in the context of the procedure for the grant of indefinite appointments and which prompted the impugned decision of 29 September 1992. The division leader cited the opinion of the group the complainant belonged to, and by the same token the favourable assessment of him by his first-level supervisor: "the group had no difficulty" with him, his technical know-how went "beyond the 1990 requirements", and he had been promoted to grade 7. In an obvious allusion to the complainant's memorandum of 7 December 1990 the leader also said that 1990 had been a "turning point" in the complainant's behaviour. There is therefore no substance to the plea that essential facts were neglected.

9. So at best the complainant may plead misappraisal of the evidence, and he does so under another head. He objects in particular to the inconsistency of the recommendations the leader of his division made about him on 22 August 1990 and 21 May 1991 and to the Director-General's taking account only of the later one, which was to his detriment.

10. It is true that the Director-General's decision, being discretionary, is subject to limited review by the Tribunal and may be set aside for example if he obviously misconstrued the facts. But he did not. The division leader changed his mind, not arbitrarily, but on account of a change in the complainant's own behaviour as reported in the division leader's note of 27 March 1991 in the following terms:

"... we have suddenly met in the course of the past seven months a very non-cooperative, if not to say obstructive attitude, which has hampered the program of work."

The plea of misappraisal is not proven.

The alleged lack of reasons for the decision and the plea of abuse of procedure

11. In the complainant's submission the decision not to extend his appointment was substantiated by reference to criteria that should have applied only to the conversion of the nature of an appointment. There was therefore an abuse of the procedure.

12. He is mistaken. The decision not to extend the complainant's fixed-term appointment reads:

"... the question of renewal ... was also discussed with your supervisors in the ST Division. Their opinion was unfavourable for the same reasons as those set out in the ... appraisal of 21 May 1991: reservations about your behaviour, adaptability and team spirit."

Such reasons suffice in law to warrant the impugned decision, even if given in the course of the procedure for the grant of indefinite appointments, provided that there is no evidence of any flaw in that procedure. The complainant is saying that CERN failed to abide by its own rules - the ones it set in circular No. 9 of November 1990 - by declining to take all the material evidence into account. But, as CERN observes, the circular merely concerns the substantive conditions for the grant of an indefinite appointment and the rules of procedure are in bulletin 10/91 of 4 March 1991. There is no reason to suppose that the board set up ad hoc to review the candidates' records based its recommendations to the Director-General on incomplete evidence.

The charge of abuse of authority

13. The complainant argues that by endorsing those recommendations the Director-General showed prejudice against him and committed an abuse of authority by making his alleged uncooperativeness a pretext for refusal of both the renewal and the grant of an indefinite appointment and by imposing on him a covert disciplinary sanction without first bringing disciplinary proceedings.

14. CERN was under no duty to bring disciplinary proceedings against the complainant if the allegations about him did not in its view so warrant. Under the circumstances the decision to terminate his appointment "at the end of the prescribed period" under Regulation R II 6.02 did not amount to a sanction.

Partial failure to execute Judgment 1185

15. Lastly, the complainant pleads failure by the Director-General to discharge all his obligations under Judgment 1185.

16. On that score he succeeds. The effect of quashing the decision of 9 July 1991 was to restore the status quo ante, and in particular to cancel the notice that CERN gave him of termination at 31 January 1992. He left CERN at that date and the Director-General has again refused to renew his appointment. So there must be a decision on his terminal entitlements.

17. First, since the Organization failed to give him the six months' notice due under Regulation R II 6.02 of the decision not to extend his fixed-term appointment from 1 February 1992, he must be deemed to have remained in CERN's employ from that date until he received the new decision dated 29 September. He got it the next day. But from any arrears of pay due to him must be subtracted the amount of the provisional award by the Tribunal.

18. Moreover, according to the Regulations the Organization ought to have notified to him its decision of 29 September not to renew his appointment six months before the date of expiry. He is therefore entitled to an award of compensation corresponding to six months' notice, including social benefits.

19. Since his main claim to quashing 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 September 1992.
2. CERN shall, in execution of Judgment 1185, pay the complainant his remuneration from 1 February to 30 September 1992 and compensation corresponding to six months' notice, less any amounts paid to him of the kind stated in 17 above, plus interest at the rate of 10 per cent a year from the dates at which the sums fell due up to the date of payment.
3. The Organization shall pay him 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, Mr. Pierre Pescatore, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda  
P. Pescatore  
E. Razafindralambo  
A.B. Gardner