

SEVENTY-SECOND SESSION

***In re* GIROD and PEYRET**

Judgment 1151

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean-Pierre Girod against the European Organization for Nuclear Research (CERN) on 21 January 1991 and corrected on 20 February, CERN's reply of 8 May, the complainant's rejoinder of 27 June and the Organization's surrejoinder of 16 September 1991;

Considering the complaint filed by Miss Catherine Peyret against CERN on 22 January 1991 and corrected on 20 February, CERN's reply of 8 May, the complainant's rejoinder of 8 July and the Organization's surrejoinder of 16 September 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 7(4) and 13(1) of the Rules of Court and Article R II 6.02 of the CERN Staff Rules and Regulations;

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

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

A. Mr. Girod joined the staff of CERN as a mechanic at grade 4 on 1 October 1983 under a one-year contract. He had his appointment extended three times. On 1 July 1985 he was promoted to grade 5. His third and last extension ended at 30 September 1991.

Miss Peyret joined CERN on 1 August 1984 as a technician at grade 5 on a one-year appointment. She later got three extensions, the last of which is to expire at 31 July 1992. On 1 July 1988 she was promoted to grade 6.

On 9 July 1990 the Organization's weekly news bulletin announced a new procedure for awarding indefinite appointments. The procedure was in three stages:

- (1) "the Divisions and Personnel Division" verify the "list of candidates qualifying for review";
- (2) an Indefinite Appointment Review Board examines recommendations from the divisions and submits proposals to the Directorate; and
- (3) the Directorate takes the final decisions.

A circular explaining the arrangements for applying the procedure recommended that candidates should be interviewed by the division leaders or their nominees and the results of the interviews incorporated in their recommendations.

By letters of 24 October 1990 the Leader of the Personnel Division told the complainants that CERN would not grant them indefinite appointments; nor would it renew or extend their present contracts. The letters were intended to give notice in compliance with Article R II 6.02 of the Staff Regulations.

In letters dated 3 December 1990 to the Director-General the complainants objected to the decisions of 24 October 1990, asked whether they were final and announced their intention of going to the Tribunal. Having got no answer they applied again for review of the decisions of 24 October 1990 by letters of 9 January 1991 to the Director-General.

In the absence of a reply they filed the present complaints on 21 and 22 January 1991 against the decisions. The Director-General confirmed those decisions by letters of 23 January 1991.

B. The complainants submit that the decisions depriving them of indefinite appointments and the renewal of their contracts are unlawful.

It is the Director-General as appointing authority who is empowered to decide on renewals. Inasmuch as the decisions under challenge were taken by the Leader of the Personnel Division and not by the Director-General they are ultra vires.

CERN also infringed their right to a hearing. Mr. Girod was unaware that he was being considered for an indefinite appointment and did not even have an interview with his division leader, as the above-mentioned circular required, before the decision he impugns was taken. Miss Peyret did have an interview with her division leader and he actually said he would recommend her for an indefinite appointment, but that recommendation was not incorporated in his recommendation.

They allege breach of good faith in the Director-General's failure to carry out the promise he made at a staff assembly on 17 December 1990 that where the division leaders and group leaders disagreed he would see those concerned and hold over the decision until the following year.

Mr. Girod objects to an adverse assessment signed by his division leader on 3 September 1990 on the grounds that it is at odds with the opinion of his previous supervisors. They were all satisfied with his work, described him as "a technician of exceptional professional and personal quality" who "showed much interest in his work", and supported his application for an indefinite appointment. So the decision of 24 October 1990 by the Leader of the Personnel Division to deny him the indefinite appointment is arbitrary, disregards essential facts and, being based on the division leader's single adverse assessment constitutes a blatant misappraisal of the evidence.

Miss Peyret charges the Leader of the Personnel Division with failing to take account of such essential facts as the successive extensions of her appointment, the last of which came through just a few months before the decision she is objecting to. Each of the extensions was based on good reports by her supervisors. On the only occasion when she and her division leader met he told her how highly he thought of her and the change in his opinion suggests flagrant misappraisal of the facts.

Mr. Girod invites the Tribunal to set aside the decision he impugns, order his reinstatement and award him whatever sum in damages it deems fit. He also claims costs.

Miss Peyret asks the Tribunal to quash the decision she is challenging, order her reinstatement should it rule on her case after the date of her separation and award her an appropriate sum in damages and her costs.

C. In its replies CERN submits that the complaints are devoid of merit.

First, the decisions under challenge were taken on the Director-General's behalf by delegation of authority to the Leader of the Personnel Division. Good faith requires that any personnel management decision notified by the Leader of the Personnel Division should be deemed to have been taken by the competent authority.

Secondly, CERN denies breach of the complainants' right to a hearing. It informed Mr. Girod that he was being considered for an indefinite appointment and he had an interview with one of his supervisors on 17 July 1990 before the impugned decision was taken. Miss Peyret knew that the interview she had on 19 July 1990 was in the context of the procedure for the grant of indefinite appointments, and she was free to express her views on that occasion.

Thirdly, any statements the supervisors made before 1990 are immaterial because they relate to periods of service under fixed-term contracts, not to suitability for indefinite appointment. Their division leaders' final recommendations were based on comprehensive study of all the evidence on file. The fact that their supervisors were of one mind shows that the complainants failed to meet the conditions in the rules for the grant of an indefinite appointment and precludes any misappraisal of the evidence.

Lastly, since their supervisors did not disagree the complainants may not rely on the Director-General's alleged "promise" at the staff assembly.

D. In their rejoinders the complainants enlarge on their pleas, seek disclosure of the minutes of the Review Board's

meetings and press their claims.

E. In its surrejoinders the Organization rejects the complainants' claims as unfounded. As is clear from the reference to Article R II 6.02 of the Staff Regulations, the decisions of 24 October 1990 were taken by the Director-

General, as he confirmed in his letters of 23 January 1991. The Organization develops its contention that appraisals of the complainants' performance up to 1990 had no bearing on the grant of an indefinite appointment.

CONSIDERATIONS:

1. Mr. Girod joined CERN on 1 October 1983 as a grade 4 mechanic and Miss Peyret on 1 August 1984 as a grade 5 technician. They have always held fixed-term appointments. Mr. Girod's last extension of appointment expired on 30 September 1991 and Miss Peyret's is to expire on 31 July 1992.

The Directorate and the Management Board of CERN informed the staff in 1990 of a new procedure for the grant of indefinite appointments to eligible staff. The complainants were among the candidates for such appointments.

The review took place from July to October 1990. On 24 October the Leader of the Personnel Division told each of them by letter not only that they had been unsuccessful but that their fixed-term appointments would not be renewed on expiry.

Those are the impugned decisions, which, since no appeal lies under the CERN Staff Rules, are final and may be challenged directly before the Tribunal.

2. Complaints that raise different issues of fact as to the position of the complainant are ordinarily ruled on separately, but these complaints are joined because the common plea stated below is allowed.

3. According to consistent precedent a decision to appoint or promote a staff member, even though it is a matter of discretion, may be set aside, and one flaw that will be fatal is that it was taken without authority.

That is one of the flaws the present complainants are alleging.

According to the Staff Rules and Regulations the Director-General bears sole responsibility for individual decisions on the status of staff. That general rule covers appointment, refusal to grant an appointment and extension of a fixed-term appointment.

The two impugned decisions of 24 October 1990 were signed, not by the Director-General, but by the Leader of the Personnel Division.

Though not denying that, CERN submits that the decisions were taken on the Director-General's behalf by "delegation of authority"; that a decision on personnel management notified by the Leader of the Personnel Division is ordinarily to be deemed to have been taken by the competent authority; and that there was implied delegation to the Leader of the Personnel Division of authority to sign the decisions.

Such a broad statement of principle is unsound. Delegation of authority to sign must as a rule be explicit. An executive head has the duty of delimiting what his subordinates may or may not do and he alone is answerable to the governing body of the organisation. He is not relieved of the duty of personnel management by vague phrases that purportedly empower heads of unit to act without supervision.

4. The want of proper delegation will not necessarily taint a decision signed *ultra vires*, the material issue being who actually took the decision. But there is no telling from the letters of 24 October 1990 who actually made the decisions in these cases. The text cites no delegation of authority to sign; the only reference to the decision is impersonal and raises no presumption whatever of such delegation.

In support of its contention that the impugned decisions are lawful CERN appends to its surrejoinders, which the complainants have not had the opportunity of addressing, a bulletin dated 29 October 1990 which reads:

"Considering the recommendations made by a CERN-wide Review Board, the Director-General took the following

decisions ...

All candidates will be informed individually regarding the decision in their case, through the divisional hierarchy."

The assertion in the bulletin that it was the Director-

General who took the decisions would ordinarily be fatal to the complainants' plea, at least insofar as it relates to the refusal to grant them an indefinite appointment.

But the Tribunal is led to a different view by another item of evidence which the complainants append to their original briefs and which the Organization does not challenge as either fabricated or inaccurate.

On 17 December 1990 the Director-General addressed a staff assembly on the subject of indefinite appointments. In a lengthy answer to criticism he admitted to not having looked at the personnel records before the impugned decisions had been signed and he reserved his position as to the objections he had received. He went on: "I prefer to hold the whole operation over for a year for these people, another year, and we shall see next year: that is my personal decision".

In the circumstances, though there may be some doubt about exactly what the Director-General meant, the Tribunal is not satisfied that he took the impugned decision even by intermediary. In fact the recommendations by the Review Board were endorsed without any consideration on the competent authority's part. Yet that authority has a duty to study the personnel records when a decision is to be taken on a staff member's status.

5. The foregoing holds good only insofar as the impugned decisions refuse an indefinite appointment since the Director-General did not say anything in particular about the other matter they deal with. But there is no obvious logical connection between the refusal to grant an indefinite appointment and the refusal to renew a fixed-term one. Indeed CERN has never given the complainants the reasons for non-renewal and says not a word on the subject in its pleadings to the Tribunal.

So there is no evidence to suggest that the decisions were lawful as to non-renewal either.

6. There is no need to consider the letters which the Leader of the Personnel Division signed on 23 January 1991 and which merely repeated what the earlier letters had said about an indefinite appointment. They were not challenged in any internal appeal, since such appeal does not lie, and are therefore immaterial.

7. For the foregoing reasons the Tribunal sets aside the impugned decisions without taking up the complainants' other pleas.

The quashing of the decisions entails referral to the Organization for review in line with what is said in this judgment.

Unless Mr. Girod got an extension of appointment of which the Tribunal has not been informed, he left the Organization at 30 September 1991. Pending final settlement, therefore, the Organization shall make him a provisional award of an amount equivalent to six months' remuneration, to be subtracted from the amounts that it will ultimately pay to him.

Since Miss Peyret, whose fixed-term appointment will not expire until 31 July 1992, is still on the staff, CERN has time in which to decide on her claims both to a permanent appointment and to renewal of her fixed-term one. She does not substantiate her claims to compensation or claim particular sums, and a ruling on those claims is adjourned until the Director-General takes his new decision.

8. Since the complainants succeed they are entitled to costs, which the Tribunal sets at 4,000 Swiss francs each.

DECISION:

For the above reasons,

1. The decisions of 24 October 1990 are set aside.

2. The cases are sent back to CERN for review of the complainants' claims in line with what is said in 7 above.
3. CERN shall make Mr. Girod a provisional payment award of an amount equivalent to six months' remuneration.
4. CERN shall pay the complainants 4,000 Swiss francs each in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

(Signed)

Jacques Ducoux
Mella Carroll
José Maria Ruda
A.B. Gardner