

SEVENTY-FOURTH SESSION

***In re* KAISER**

Judgment 1217

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roland Kaiser against the European Organization for Nuclear Research (CERN) on 10 April 1992, CERN's reply of 15 June, the complainant's rejoinder of 17 July and the Organization's surrejoinder of 21 August 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations R II 1.32, R II 1.33 and R VI 1.11, and Annex R A 10 of the CERN Staff Regulations and Administrative Circular No. 24;

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. The complainant, a Swiss citizen who was born in 1932, joined CERN in 1961 as an operator at grade 5. When he was recruited his home was Geneva, but after the Staff Rules and Regulations were revised in 1968 it was changed to Winterthur, also in Switzerland, and he was treated as non-resident.

He applied for early retirement at 31 December 1992. The Leader of the Personnel Division agreed on 22 May 1991 and told him that he would receive the termination indemnity provided for in paragraphs 1 and 4 on page 4 of Annex R A 10 to the Staff Regulations.

On 10 April 1991 he had applied for a change in his home station to Stuttgart, in Germany, on the grounds that he no longer had any ties with Winterthur, where he and his parents had lived before he came to Geneva. His parents were dead and his wife's family were living in Stuttgart, where he had a flat and intended to live after retirement. He relied on paragraph 8 of Administrative Circular No. 24 of April 1988 in support of his request. The paragraph reads:

"... no such request will be entertained by the Director-General unless the person concerned has been at CERN for at least 15 years and is at least 55 years old."

By a letter of 24 April 1991 Personnel turned down his request on the strength of Regulation R II 1.32, which reads:

"The home station of a member of the personnel shall be determined, at the time of his appointment, by the Director-General taking account of the place of residence, and the family, professional and civic ties of the person concerned.

a) For a national of a Member State, the home station shall be deemed to be on the European territory of that State, save where the above considerations are such as to determine the home station on the European territory of another Member State;

..."

Personnel said that the complainant's home station must be in Switzerland because he was a citizen of the country and still had ties with it, having lived there for so long. The dual nationality of his wife and her family was not decisive, and his having a flat in Stuttgart was immaterial because it was not in the country of his nationality. Besides, the change he wanted would put up the costs to be borne by CERN. The decision was a discretionary one, CERN's own interests were relevant and in this case they required application of Regulation R II 1.32 a).

The complainant wrote to the Director-General on 8 May 1991 lodging an internal "complaint" and citing Regulation R II 1.33:

"At the request of the member of the personnel concerned, the home station may be changed during his period of employment, at the discretion of the Director-General ..."

In its report of 11 October 1991 to the Director-General the Joint Advisory Appeals Board recommended changing his home station on the grounds that neither the Staff Rules and Regulations nor circular 24 required that the new home station be in the staff member's own country. By a letter of 17 January 1992 the Director of Administration told the complainant that the recommendation was rejected. That is the decision he is impugning. He wrote to the Director-General on 7 February 1992 asking him to reverse the Director of Administration's decision but by a letter of 21 February 1992 the Director-General upheld it.

B. The complainant pleads a procedural flaw. In his submission the decision of 17 January 1992 was not taken by the competent authority, the Director-General, as Regulation R VI 1.11 requires. Although the Director-General upheld it he did so on the strength of the complainant's letter of 7 February 1992, not of his actual appeal.

The complainant contends that, though Regulation R II 1.32 says that the staff member's home station "shall be deemed" to be in the country of his nationality, there is no obligation about it, nor is nationality the only relevant yardstick: R II 1.32 also refers to family, professional and civic ties. Circular 24 too is clear on that score. The material rules do not preclude change in the home station. In a similar case the Director-General exercised his discretion in the staff member's favour. According to circular 24 staff may have their home station changed on retirement. So the Director-General's decision that his home station might be changed only to some other place in Switzerland was a mistake of law.

He further argues that CERN overlooked essential facts: his parents' death, and his family's settling in Stuttgart and his having a flat there. His situation is covered by paragraph 8 of circular 24.

He claims the quashing of the decision of 17 February 1992 and costs.

C. CERN replies that if the complainant believed the decision to be ultra vires he should have said so in his letter of 7 February 1992 to the Director-General. His objection is both pedantic and out of time.

The Organization says that it made no mistake of law. The complainant's home station was determined on recruitment in keeping with Regulation R II 1.32 a), which lays down that the home station should be within the country of nationality. The complainant's was determined to be in Switzerland and he has never challenged that decision. Applications for changes of home station are subject to Regulation R II 1.33 and circular 24, which neither state nor imply that R II 1.32 a) does not apply to such changes.

The Organization bore in mind all the essential facts in applying R II 1.32 a). The complainant has not shown that he met the requirements for a change in his home station. He said that his "children" had settled in Stuttgart, though there is no mention of children in his personal file, and that he had a flat there, a fact that affords no sufficient reason for change. Though the reason he gave for his application was retirement, the home station may be changed only if new circumstances so warrant while the staff member is still serving. He did not ask for change when his parents died or the children moved. So there was nothing new about those facts by 10 April 1991, when he asked for the change.

D. In his rejoinder the complainant enlarges on his pleas. He says that in determining his home station CERN discounted "family ties", the first criterion to be mentioned in R II 1.32 a) and fastened on "civic ties", which circular 24 dismisses as of slight importance. The Regulations provide for return to the home station, not to the country of origin or of nationality.

The complainant got married on 15 October 1976. His wife had a son by an earlier marriage whom he has brought up, though he never adopted him or asked CERN to treat him as a dependant. The son is now married and has two daughters whom the complainant regards as grandchildren. Those are essential facts that CERN overlooked.

The similar case was that of an Italian staff member whose home station was Naples. His wife was Greek, and on appeal CERN paid the cost of his removal to Greece even though the Director-General had not changed his home station.

His removal to Stuttgart would cost CERN only 1,000 Swiss francs more than removal to Winterthur.

E. The Organization points out in its surrejoinder that the impugned decision rests on Regulation R II 1.33, which confers on the Director-General discretion to determine the home station. The relevant criteria are not stated in order of priority and circular 24 states explicitly that they may be combined. The complainant is confusing nationality and civic ties. The home station may be changed only in exceptional circumstances, and CERN's consistent practice is to determine the home station on the European territory of the country of nationality. The complainant's family ties were not a relevant criterion because he had never shown he had dependant children living in the place which he would now like to be his home station. The whole purpose of R II 1.32 is to determine the home station on recruitment or, in exceptional circumstances, during the appointment, but certainly not to allow a change on retirement.

CONSIDERATIONS:

1. The complainant, a Swiss citizen, was on the staff of CERN until 31 December 1992. On 10 April 1991 he applied to the Director-General for the change of his recognised home station from Winterthur, in Switzerland, to Stuttgart, in Germany. The reasons he gave were that his parents, who had lived at Winterthur, were dead, he had no ties any more with Switzerland, and he intended shortly to retire and live with his wife and children in Stuttgart, where he had a flat.
2. On rejection of his claim he asked the Director-General on 8 May 1991 to put the matter to the Joint Advisory Appeals Board. The Board took the view that the Director-General's decision was wrong in law and the change in the complainant's situation warranted changing his home. It recommended reversing the decision.
3. By a letter of 17 January 1992, the one now impugned, the Director of Administration informed the complainant that for two main reasons the Director-General had rejected the Board's recommendation. The first reason was that Regulation R II 1.32 a) of the Staff Regulations raised a presumption in favour of determining the home station in the country of nationality; that determination being final, the Organization's sole duty was to enable the official to go back to his home country at the end of his appointment. The second reason was that the Staff Regulations gave the Director-General discretion to determine the home and the complainant had shown no exceptional circumstance, such as a formal or procedural flaw or a mistake of fact or of law, warranting review.
4. On 7 February 1992 the complainant wrote the Director-General a letter challenging those reasons and seeking reversal of the decision by the Director of Administration. On 21 February the Director-General informed him that he was refusing the claim and therefore upholding the decision. The complainant filed this complaint on 10 April 1992.

The plea of ultra vires

5. The complainant's first plea is that the impugned decision is unlawful because the Director of Administration had no authority to take it: according to the Staff Regulations the Director-General himself ought to have signed it.
6. The plea fails. It is plain on the evidence that the decision gave effect to the Director-General's wishes. The complainant himself helped to dispel doubt on that score by putting the matter yet again to the Director-General after he had got the letter of 17 January 1992 and so letting the Director-General make it clear that the decision by the Director of Administration was indeed his own.
7. Since the defendant does not argue that the complainant is impugning the wrong decision or has missed the time limits, the Tribunal will go into the merits.

The merits

8. The complainant has two main pleas on the merits. One is that CERN committed a mistake of law in that in the exercise of its discretion it refused even to consider changing his home station although the Staff Regulations allowed it; and secondly, having so prejudged the issue, it disregarded the facts that he had relied on and that showed the shift of his family ties from Switzerland to Germany.
9. Only in its reply does the Organization give a fuller account of its position in law on such matters and of its

assessment of the complainant's own circumstances.

10. It explains that as a rule it will determine a staff member's home station in the European territory of the country of his nationality and allow exceptions only where there are quite particular reasons for doing so. And it will change the home station only in exceptional cases where the staff member's circumstances have so fundamentally altered as to warrant it.

11. In answer to the evidence the complainant offers it observes, first, that when a staff member's circumstances change he must so inform it at the time. The complainant did not ask for the change of his home station until he was about to retire. He thereby overlooked the whole point of home leave, which is to help staff to keep in touch with their home country while still serving, not to make ready for retirement.

12. Secondly, the Organization submits that the factual circumstances warrant no change in the complainant's home. He now speaks of children whom he never told the Organization about before and whom it is therefore entitled to ignore. That his wife has German besides Swiss citizenship and that he has a flat in Stuttgart are not facts important enough to warrant an exception to the practice of determining the staff member's home station so far as possible in the country of nationality.

13. The material rules are as follows.

(a) Regulation R II 1.32 a) reads:

"For a national of a Member State, the home station shall be deemed to be on the European territory of that State, save where the above considerations are such as to determine the home station on the European territory of another Member State".

The "considerations" that Regulation refers to include place of residence and family, professional and civic ties.

(b) Regulation R II 1.33 provides:

"At the request of the member of the personnel concerned, the home station may be changed during his period of employment, at the discretion of the Director-General ..."

14. Those rules call for comment. The original determination of the home station on recruitment and any later change are incontrovertibly at the discretion of CERN, which has to give weight to the various criteria the Staff Regulations set. For the sake of sound management, too, the Organization may set guidelines on the matter. So there can be no objection to its consistent policy of determining the staff member's home, barring evidence to the contrary, in his own country and allowing later change to some other country only where some change in circumstances so warrants.

15. As the Appeals Board held, CERN may not, just because it prefers the complainant's home to be in his own country, properly plead its own discretion in the matter so as to preclude discussion of his circumstances and a change in his home.

16. Yet, as the pleadings show, the Organization had sound reasons for refusing a change. Quite plainly the complainant failed to make his claim when the changes he is now relying on came about. The very wording of his claim shows that he did not try to get the change until he was on the verge of retiring. So CERN was right to reject his claim, which, in view of the declared purpose of the Staff Regulations, was none of its concern any more.

17. The conclusion is that, despite the nature of its pleas in defence of the decision impugned, the Organization did act properly on the objective grounds revealed in the adversarial pleadings before the Tribunal.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr.

Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

José Maria Ruda
Mella Carroll
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.