

The Administrative Tribunal,

Considering the complaint filed by Mrs S. B. against the European Organization for Nuclear Research (CERN) on 12 February 2007, the Organization's reply of 22 May, the complainant's rejoinder of 21 June and CERN's surrejoinder of 19 September 2007;

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 British national, was born in 1969. She joined CERN on 1 June 2001 as an Internal Auditor in the Internal Audit Service, which forms part of the Organization's Directorate Services Unit. Her contract indicated that she would join the Organization under a three-year contract of limited-duration and that that contract could be renewed or extended up to a maximum total period of six years. The contract also stipulated that it was not convertible into an indefinite contract. Her contract was subsequently renewed for three years with an expiry date of 31 May 2007. The corresponding contract amendment stipulated that "[n]o further renewal nor prolongation shall be granted".

Effective January 2006 CERN's staff contract policy changed. Prior to that date, staff were recruited under either fixed-term contracts, which could be converted into indefinite contracts, or limited-duration contracts, which could not be converted. Subsequent to the policy change, staff are recruited primarily under limited-duration contracts. Administrative Circular No. 2 (Rev. 3) of January 2006 provides that staff employed under limited-duration contracts may be awarded an indefinite contract "provided that there is at least one long-term job available for the activity concerned within the manpower plan of the Department concerned". If such a job exists a staff member's suitability for the post must then be assessed using prescribed "personal criteria" including performance, conduct and flexibility. CERN applies the new policy to all staff members, including those recruited prior to the change. In October 2006 a Manpower Plan was submitted for information and discussion to the CERN Council which updated previous plans and described, inter alia, staff evolution, composition and policy as well as the Organization's future manpower needs.

Combining maternity, saved, annual and sick leaves, the complainant was absent from work from 4 January through 13 September 2006. When she returned on 14 September 2006 the Head of Internal Audit told her verbally that her contract would not be renewed beyond 31 May 2007. By letter dated 6 November 2006 the complainant received official notification from the Head of the Human Resources Department that, within the Directorate Services Unit manpower plan, there was no long-term job available in her activity. Consequently, her contract would expire on 31 May 2007. That is the impugned decision.

B. The complainant contends that during her recruitment interview in December 2000 the then Head of Internal Audit gave her oral assurances that it was the practice for CERN to offer employees two consecutive three-year contracts and then "convert these contracts into more permanent positions which would lead to an indefinite appointment". She states that she accepted the position at CERN on the basis of this information and that she feels she has been misled. Furthermore, when her contract was extended the Head of Internal Audit told her that "an indefinite contract at CERN would not be a problem".

Citing the Tribunal's case law, the complainant argues that the Organization did not substantiate the decision regarding the non-renewal of her contract. On 14 September 2006 the new Head of Internal Audit provided three reasons for the decision. First, as a consequence of cuts in Internal Audit, her position would no longer exist. The complainant refutes this on the basis that she was told she was being replaced. The second reason was a concern about her work motivation. She alleges that before she took maternity leave the Head of Internal Audit questioned her motivation to return to work after having a baby. He again raised the issue of her motivation upon her return. She points out that her written assessments indicate that she consistently performed well. Additionally, she

responded to e-mails during her maternity leave, demonstrating a continued willingness to work. The third reason related to a new rotation policy within the Internal Audit Service whereby staff would no longer remain in Internal Audit for a long period of time. In her opinion, she cannot be bound by any such policy because she was first told about it the day she learned her contract would not be renewed. Relying on the case law, she alleges that the policy change was contrived in order to provide a reason not to award her an indefinite contract.

She also argues that the reasons for the decision were not conveyed to her in a way that allowed her properly to defend her interests. She was not told when or by whom the decision about her contract was made but was presented with a *fait accompli*. CERN is in contravention of the Staff Rules and Regulations if the decision was made during her maternity leave. She adds that it is not in CERN's interest to discontinue her employment because based on a combination of her audit experience and knowledge of the Organization, she was the most experienced auditor.

The complainant alleges abuse of authority on numerous grounds. She had expressed dissatisfaction with the promotion and ad interim appointment on 1 December 2005 of one of her colleagues as the Head of Internal Audit. She had also questioned the recruitment of another staff member. In her opinion, CERN was aware that "problems" might arise upon her return from leave and it took the opportunity to "dispose of a problem". She also claims that the Head of Internal Audit made prejudicial comments about her religion. She concludes that his comments and her opposition to his appointment were taken into account when the decision was made about her employment.

The complainant asks the Tribunal to set aside the Organization's decision not to award her an indefinite contract. She claims damages in the amount of 200,000 Swiss francs for the effects the decision has had on her self-confidence and the infringement of her right to dignified and fair treatment. She claims material damages in the amounts of 11,496.80 francs for the loss she incurred upon the sale of her car and 2,808.60 francs representing a pro rata reduction in the education allowance she received for her children.

C. In its reply CERN states that no promise or guarantee of an indefinite appointment was given to the complainant. When she signed her limited-duration contract she was aware that under the Staff Rules and Regulations applicable at the time, only employees with fixed-term contracts could be considered for an indefinite contract.

The Organization considers that it properly substantiated its decision. It agrees that the complainant was told that a reduction of posts in Internal Audit was a factor in the decision regarding her employment. It denies her claim that she was being replaced and explains that the current Manpower Plan does not permit the recruitment of a successor. Indeed, it provides for a reduction of posts in the administrative sector which includes Internal Audit. It had already been decided that the posts of two retiring staff members within Internal Audit would be discontinued, but in light of the latest Manpower Plan the management, in consultation with the Head of Internal Audit, decided to reduce further the number of long-term positions. CERN contends that this was a reasoned decision.

The Organization's concerns about the complainant's motivation related solely to her working hours. It refers to specific examples of her absenteeism. The former Head of Internal Audit had discussed this with her, as had the current Head of Internal Audit, both in his capacity as her colleague prior to his promotion and as her supervisor before she took her maternity leave. On 14 September 2006 her motivation was mentioned only in the context of the personal criteria which would have been applied to assess her suitability for the award of an indefinite contract if a long-term position had been available.

With respect to a staff rotation policy, CERN explains that after a consultation process, which at one stage included the complainant, a decision was reached that internal auditors should not be granted indefinite contracts. It intends, insofar as possible, to apply the principle not to offer long-term career prospects within the Organization to all members of the Internal Audit Service.

The Organization contends that the communication of the impugned decision satisfies the requirements of competence, form, timing and procedure set out by the case law. The complainant was given reasonable notice of the decision, it was duly substantiated and its reasons were conveyed to her in a manner allowing her to defend her interests. No material fact was overlooked and no obvious mistake of fact or law was made. CERN acknowledges that the Staff Regulations prohibit a decision to dismiss a staff member during her maternity leave, but points out that the complainant was not dismissed.

The Organization considers that the complainant is a competent, professional auditor but it challenges her description of her qualifications and performance. It strongly denies that she was the subject of religion-based prejudice, and observes that she did not formally or informally report such behaviour. It considers that the decision regarding her employment was taken in the Organization's interest, without any abuse of authority.

D. In her rejoinder the complainant presses her pleas. She alleges she suffered a disadvantage because the previous Head of Internal Audit failed to resolve her contractual status before his retirement in November 2005 and consequently she was evaluated under the new policy introduced in January 2006.

She develops her argument regarding her allegations of prejudice on the ground of her religion.

She challenges the Organization's reliance on the Manpower Plan. She points out that it does not include a breakdown on a departmental or unit level which specifically supports the elimination of an internal auditor's post and she asks to see detailed figures. She argues that any overall staff reduction policy should have been communicated to her at the time of her recruitment. She is surprised by CERN's comments about her motivation and refers to her performance reports and the absence of formal disciplinary action or warnings. She denies that she was told she might not satisfy an assessment under the personal criteria. In her opinion, the Organization's arguments are intended to cast doubts on her professional integrity. With respect to her not lodging a formal complaint, she submits that staff employed under limited-duration contracts are in a "precarious position, particularly in the current climate" and that it is not "considered good behaviour" to complain. She states that she was not involved in discussions regarding a rotation policy.

E. In its surrejoinder CERN maintains its position. It emphasises that there is no long-term job in the complainant's activity and that, consequently, it is unable to grant her an indefinite contract. It asserts that information about impending staff reductions due to the implementation of the Manpower Plan was provided to her at numerous times. It denies that there was a "failure" or "delay" of any sort with respect to her contract and states that there are no grounds upon which to "resolve" her "contract status".

Concerning the allegations of discrimination, CERN points out that it does not ask recruitment candidates to declare their faith and cannot therefore keep statistics on the subject. It expresses "its total disapproval of [the complainant]'s attempts at discrediting the Organization".

## CONSIDERATIONS

1. The complainant joined CERN as an Internal Auditor on 1 June 2001. She was employed under a contract of limited-duration for a period of three years. The contract provided that it could "be renewed or extended up to a maximum total period of 6 years". It also stipulated that "[a] contract of limited duration [was] not convertible into an indefinite contract". Her contract was renewed on 31 October 2003 for the period 1 June 2004 to 31 May 2007. The notification of renewal provided that "[n]o further renewal nor prolongation shall be granted".

2. With effect from 1 January 2006, it became possible for contracts of limited-duration to be converted into indefinite contracts. The criteria for conversion are set out in Administrative Circular No. 2 (Rev. 3) of January 2006. Paragraph 50 provides that:

"The Director-General may award an indefinite contract provided that there is at least one long-term job available for the activity concerned within the manpower plan of the Department concerned."

Conversion also depended on "personal criteria", including performance, conduct and flexibility. However, in accordance with paragraph 49, a staff member would be assessed according to personal criteria only if the condition in paragraph 50 was satisfied.

3. When the complainant returned to work on 14 September 2006, the Head of Internal Audit informed her verbally that her contract would not be converted and, hence, would not be renewed when it expired on 31 May 2007. According to the complainant, she was given three reasons for the decision, namely, cuts in Internal Audit, her lack of motivation and a new policy of rotating internal audit staff. The complainant became ill after this conversation and, save for some few days in September, was absent on sick and other leave until her contract expired on 31 May 2007.

4. The final decision with respect to the non-conversion of her contract was contained in a letter dated 6 November but not received by her until 28 November 2006. It was said in that letter that there was no long-term job available in the complainant's activity within the Directorate Services Unit and that, pursuant to the specific conditions stated in her contract of employment, her contract would expire on 31 May 2007. The complainant filed her complaint on 12 February 2007, seeking to have the decision of 6 November 2006 set aside and claiming compensation for the impact of the decision on her self-confidence and for material losses involved in the sale of her car and extra school fees for her children.

5. The complainant contends, in essence, that the decision not to convert her contract was not taken in good faith and constituted an abuse of authority. She makes two main arguments. The first is that she was given oral assurances, at the time of her recruitment and at various times prior to January 2006, that the conversion of her contract was a mere formality. The second is that the lack of a long-term job in her activity was not the real reason for the decision in question. Additionally, she claims that the decision was not properly motivated and was not conveyed to her in a way that allowed her properly to defend her interests.

6. So far as concerns the argument that the complainant was given oral assurances as to the conversion of her contract, it is to be noted that, apart from her own statements, there is no evidence to this effect. Moreover, if assurances were given, they would have been in direct conflict with the express terms of the complainant's initial contract and the notification of its renewal in October 2003, both of which she must be assumed to have read and understood. However, the complainant contends that, even before 2006, it was possible to convert a contract of limited-duration and that she was disadvantaged by reason of her case being considered under the new procedures introduced in that year. In support of this argument, she relies on extracts from the CERN Human Resources Annual Report 2004, as updated in 2006, and the Administrative Procedures Manual.

7. The Human Resources Annual Report 2004 relevantly states:

“Limited-duration contracts for a maximum of six years [...] cannot be converted into indefinite contracts. However, in many cases Staff Members on limited-duration contracts apply successfully for vacancies offering fixed-term contracts.” (Emphasis added.)

The second extract, a flow chart, clearly shows that a person on a contract of limited-duration was required to go before a Selection Board as an external candidate before obtaining a fixed-term contract. Having regard to these documents, the complainant's claims both with respect to oral assurances and to disadvantage must be rejected.

8. The complainant points to a number of matters to establish that the lack of a long-term job was not the real reason for the impugned decision. She claims that the Head of Internal Audit was antipathetic towards her because she had opposed the manner of his promotion, as well as the appointment of another internal auditor. She also alleges that the Head of Internal Audit was opposed to her because she was a Muslim and that although CERN recruits staff from all backgrounds and faiths she did not notice many Muslims within the Administration. She adds that preference is given to French nationals. These last allegations are vigorously denied by CERN and it is sufficient to state that the materials do not bear out the claims made in this regard by the complainant.

9. The claim of antipathy by the complainant's colleague who became her supervisor on 1 December 2005 rests on three incidents, namely:

- (i) an enquiry by him shortly after the London bombings of 7 July 2005 as to where the complainant's husband was when the bombings occurred;
- (ii) a comment by him prior to January 2006 as to the complainant's motivation; and
- (iii) certain difficulties with respect to the complainant's taking annual leave in May 2007.

As to the first matter, it is said that the enquiry was made purely out of concerns for the welfare of the complainant's husband as he was frequently in London. Given that the enquiry was not overtly anti-Muslim and that the complainant raised no issue with respect to it at the time, that explanation should be accepted. As to the second, there is some conflict as to whether the comment was made in the context of the complainant's taking maternity leave or whether the issue arose in relation to her leaving her office without informing her supervisor as to her movements. The latter explanation seems more likely as the question of her absences from the office was raised with the complainant both by the former Head of Internal Audit and by the current Head after he was

appointed to that position. As to the third matter, the correspondence indicates that there was a question as to the complainant's leave entitlements and she was informed that she could make use of those entitlements as and when she wished.

10. The matters on which the complainant relies with respect to the Head of Internal Audit do not establish any antipathy or hostility on his part, much less, as the complainant suggests, that he recommended against the conversion of her contract to avoid "problems that could develop on [her] return [to work in September 2006]".

11. The complainant also contends that the lack of a long-term job was not the real reason for the non-conversion of her contract because another internal auditor was recruited from 1 September 2006 and, also, because she was told that she would be replaced. Additionally, she states that the Manpower Plan is not sufficiently detailed for it to be said that there were no long-term jobs in Internal Audit and that, in any event, the audit needs of CERN cannot adequately be met by a rotation policy. Further, she claims that it was not in CERN's best interests to terminate her appointment as she was the most experienced auditor.

12. CERN denies that the complainant was told that she would be replaced and there is no evidence that she was, in fact, replaced. Indeed, the evidence is that, overall, there will be a reduction in the administrative sector by 93 posts. That evidence should be accepted, whether or not it clearly emerges from the Manpower Plan. So far as concerns the appointment of another internal auditor from 1 September 2006, there is no evidence that that appointment was on other than a limited-duration contract and, thus, no evidence that there was a long-term job available in the complainant's activity.

13. There is no doubt that the complainant is a competent and experienced internal auditor. However, the question as to what was in CERN's best interests required an evaluation of its long-term needs having regard to its overall resources, including the experience and qualifications of those members of its audit staff whose contracts would not expire until after the complainant's. These matters were duly considered and there is no evidence that the impugned decision or the Manpower Plan was motivated other than by CERN's assessment of its own best interests.

14. The evidence does not permit of a finding that the impugned decision was not based on the absence of a long-term job in the complainant's activity. Once that is accepted, it must also be accepted that the decision was properly motivated. Although other issues appear to have been raised at the meeting with the Head of Internal Audit on 14 September 2006, they were extraneous issues of no relevance then or now. Accordingly, the claim that the complainant was unable to defend her interests must also be rejected.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

