

SEVENTY-THIRD SESSION

***In re* ALBERTY**

Judgment 1166

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. José Alberty against the European Organization for Nuclear Research (CERN) on 9 October 1991, CERN's reply of 31 January 1992, the complainant's rejoinder of 17 March and the Organization's surrejoinder of 11 May 1992;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Rules I 2.01, I 3.01, VI 1.01, VI 1.02 and VI 1.05 and Regulations R II 6.06 and R VI 1.02 of the CERN Staff Rules and Regulations;

Having examined the written evidence and decided not to order oral proceedings, 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 Portuguese physicist, joined CERN on 1 April 1987 as a fellow in the Theoretical Physics Division for one year. He had his appointment extended by a year to 31 March 1989. From 1 April to 15 September 1989 and from 1 October 1989 to 31 March 1990 his status was that of an unpaid scientific associate. For the six months from 1 October 1989 to 31 March 1990 CERN paid him a subsistence allowance which he describes as "pay". From 1 April 1990 he obtained financial support from the World Laboratory, an international non-governmental organisation in Lausanne, under an agreement it had with CERN. To begin with, the support was for one year, until 31 March 1991, but it was extended by four months, from 1 April to 31 July, and then by three, from 1 August to 30 October 1991. The complainant was sent two memoranda about the three-month extension, one of 11 July 1991 from the Laboratory and one of 18 July from the Fellows and Associates Service of the Organization. It is the memorandum of 18 July he impugns.

By a letter of 31 July the President of the World Laboratory told him that as from 30 September 1991 it would stop its financial support. A memorandum of 14 August from the Fellows and Associates Service told him that the payments he had been getting from CERN would end at 30 September.

On 19 September he submitted to the Director-General of CERN his objections to the decision not to renew his appointment, citing a promise he said his supervisor had made him, by a memorandum of 25 May 1991 and in agreement with the President of the Laboratory, to extend his contract to June 1992.

Having got no answer to his objections, by a letter of 1 October to the Director-General he lodged an internal appeal against the memorandum of 14 August on the grounds of failure to observe the period of notice of dismissal in Regulation R II 6.06 of the CERN Staff Regulations.

Writing on the Director-General's behalf on 26 November 1991, the Head of Administration rejected his appeal on the grounds that the memorandum of 14 August was just the administrative corollary of a decision by the Laboratory; CERN had done no more than let him work on its premises and provided administrative services on the Laboratory's instructions and behalf and was not concerned with any promise the Laboratory might have made him; and since the memorandum had not ended his contract with CERN Regulation R II 6.06 did not apply.

B. The complainant contends that his complaint is receivable. Since no appeal will lie under Rule VI 1.02 against the non-renewal of a contract, he may come directly to the Tribunal.

In his submission his contract makes him a full-time "member of the personnel" of CERN as an "unpaid associate" under Rule I 2.01 of the Staff Rules. Though CERN recruited him on the Laboratory's behalf, he is not an employee of the Laboratory since anyone employed by a non-governmental organisation registered in Switzerland

under Sections 60 and following of the Swiss Civil Code must hold a Swiss work permit. The complainant does not have one.

His only contract of employment was with CERN. It was because he was a member of CERN's staff that the sums it paid him were free of tax.

It is immaterial that the sums CERN paid him came from the Laboratory. He submits that according to an agreement between the two organisations the President of the Laboratory, who is also a senior CERN official, promised to extend his appointment to June 1992. He alleges breach of that promise.

He seeks the quashing of CERN's decision of 18 July 1991, proper redress and costs.

C. CERN replies that the complainant's status as an unpaid scientific associate shows three peculiar features:

(1) CERN gives such an associate access to its premises and administrative support. It treats him as a member of personnel and so subject to the Director-General's authority, even though its Staff Rules and Regulations will apply only insofar as his administrative status requires.

(2) In his scientific work, however, he is not subject to CERN's authority and does not work for the Organization.

(3) He draws no pay from CERN. Most associates have an outside employer and it is the employer that pays them and is in charge of social security arrangements. But since an associate may not have enough money to live on, CERN may grant him a subsistence allowance, usually limited in time.

So the unpaid associate is not an employee of CERN.

According to arrangements with the Laboratory any associate it sponsors will, on its instructions, be paid subsistence allowance by CERN's administrative services, the amount being debited to an account it has with the Organization.

Since he did not have enough to live on it was CERN that initially paid him the allowance. Later he got financial support from the Laboratory under the arrangements explained above, first for one year, then for another four months and lastly for another three, up to 30 October 1991. The memorandum of 18 July 1991 was about the continuance of payments made by CERN on the Laboratory's instructions and behalf and had nothing to do with the extension of any contract of employment.

CERN pleads that the Tribunal is not competent to hear the complaint because the complainant has no employment relationship with the Organization: under Article II, paragraph 5, of its Statute it is open only to officials of an international organisation that has recognised its jurisdiction.

Besides, the complaint is irreceivable for lack of internal appeal. Though he appealed to the Director-General by letters of 19 September and 1 October 1991 against the memorandum of 14 August 1991 from the Fellows and Associates Service he failed to appeal against the memorandum of 18 July he is now impugning. Rule VI 1.02 is irrelevant because the memorandum does not contain a decision by CERN on renewal of a contract of service.

As for the merits, he is wrong in saying that the memorandum contained a decision by CERN and disregarded a promise of extension from the President of the Laboratory. All the memorandum said was that payment of his subsistence allowance on the Laboratory's behalf would continue. Besides, CERN knows nothing of any promise to extend his appointment to June 1992. If there was one, the President of the World Laboratory made it in his capacity as such and so it was no business of CERN's.

D. In his rejoinder the complainant maintains that he was bound to CERN by a contract which made its Staff Rules and Regulations fully applicable to him. Whatever sort of contract that may have been, the Tribunal is competent under Rule VI 1.01, which applies to all members of the personnel and so, under Rule I 2.01, to unpaid associates. The decision he is challenging was taken by the Fellows and Associates Service and so came from the only organisation he had a contract with. It was in breach of the promise he had been given.

E. In its surrejoinder the Organization submits that the complainant's rejoinder raises no new issue. It enlarges on the case made out in its reply.

CONSIDERATIONS:

The material facts

1. The complainant joined CERN in 1987 as a "fellow". When his appointment came to an end the Organization granted him from 1 April 1989 a contract as an "unpaid associate". After several extensions that contract was to end at 31 January 1992.

The Organization paid him subsistence allowance from 1 October 1989 to 31 March 1990. From 1 April 1990 he held an appointment with the World Laboratory as an "instructor" and received that allowance from the Laboratory for the year up to 31 March 1991 and then, by extension, up to 31 July 1991.

By a memorandum of 18 July 1991 the Fellows and Associates Service of CERN informed him, on instructions from Professor Antonino Zichichi, the President of the Laboratory, that his appointment was extended from 1 August to 30 October 1991. But by a memorandum of 14 August the Service told him that payments from the Laboratory would end at 30 September 1991 and that his appointment too would therefore end at that earlier date.

On 19 September 1991 he wrote the Director-General a letter objecting to CERN's refusal in its memorandum of 14 August 1991 to extend his contract notwithstanding a promise he said his first-level supervisor had made him of an extension to June 1992. Although by a letter of 1 October 1991 to the Director-General he filed an appeal "to preserve his rights" against the failure to give due notice of termination, what he is challenging in his complaint is the memorandum of 18 July 1991.

The status of an unpaid associate

2. Rule I 2.01 of the Staff Rules of CERN reads:

"The members of the personnel (M of P) shall be divided into the following categories:

a) established members of the personnel, called "Staff Members" (SM);

b) non-established members of the personnel, namely:

- Fellows (Fel)

- Paid Associates (PA)

- Unpaid Associates (UpA)

...

Unless otherwise stated, the present Rules shall apply to all persons whose contract with the Organization indicates that they belong to one of the above-mentioned categories. Each article shall indicate to which categories of the personnel it applies."

As the title suggests an unpaid associate has no right to remuneration from CERN, but to ease any financial difficulties he may be in there is provision for the Organization's paying him subsistence allowance over a limited period.

Almost all such associates are in receipt of pay from an outside employer, usually a university or scientific institute for which they are doing research at CERN. Some get financial sponsorship from an international non-governmental body. One such body is the World Laboratory, in Lausanne. To further its aim of international scientific co-operation it has a programme that seeks to make research workers, mainly from developing countries, familiar with CERN's scientific work. It provides financial sponsorship by paying subsistence allowance to research workers of its own choosing on assignment to CERN. According to the terms of an agreement with CERN payment of the allowance is made through the Organization's administrative services on the Laboratory's instructions and debited to an account the Laboratory has with CERN.

Competence

3. The Organization challenges the Tribunal's competence on the grounds that it has no employment relationship with the complainant: an unpaid associate like him does not serve CERN and is not subject to its rules, and the Organization does not pay the complainant for his work.

The plea fails under Article II(5) of the Tribunal's Statute, which reads:

"The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure."

It is not in dispute that CERN has recognised the Tribunal's jurisdiction, as indeed is reflected in Rule VI 1.05 of its Staff Rules. Moreover, the complainant, who belongs to the staff of CERN as an unpaid associate, is alleging non-observance of provisions of the Staff Rules and Regulations. As for his not working for CERN, not being subject to its rules and not getting payment from it, those are issues that have a bearing, not on the Tribunal's competence, but on the receivability of his complaint.

The Tribunal has jurisdiction.

Receivability

4. The Organization contends that the complaint is irreceivable. In its submission the complainant has no locus standi because he was not an official of CERN, had no relationship of employment with it, did not work for it and was subject to its rules only to a strictly limited extent.

As from 1 April 1989 the complainant held a contract of employment made out on a standard form and signed on the Director-General's behalf. The contract states the duration of the contract, the name of the division the complainant is assigned to and his status at CERN, and says that he is to give 100 per cent of his working time to the Organization. Although it stipulates that his "salary and expenses" shall be "covered from sources other than CERN", it adds "This contract is subject to the provisions of the Staff Rules and Regulations and to all other relevant official instructions".

In accordance with the terms of his appointment and Rule I 2.01 of the Staff Rules the complainant was therefore free to act under Rule VI 1.05, which applies to all staff members and says that they "may appeal to the ... Tribunal ... against the final decision of the Director-General". What is more, by virtue of Rule I 3.01, which applies to all "members of the personnel", the complainant is, in the exercise of his functions, "subject to the authority of the Director-General and responsible to him through [his] hierarchical supervisors".

There can therefore be no doubt but that the complainant may lodge a complaint as a member of CERN's staff.

5. But the complaint is irreceivable for another reason.

As CERN points out, the memorandum of 18 July 1991 conveys, not a decision signed by the Director-General or on his behalf, but merely a notification by the Fellows and Associates Service of the extension of the complainant's appointment "Following instructions from Prof. A. Zichichi", acting as President of the Laboratory.

The conclusion is that the decision he impugns is irrelevant to his contract with CERN, which continued until 31 January 1992, and that his complaint is on that account irreceivable.

6. That being so, his claim to costs fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr.

Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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