

EIGHTIETH SESSION

Judgment 1495

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. R. B. against the European Organization for Nuclear Research (CERN) on 16 September 1994, CERN's reply of 16 December 1994, the complainant's rejoinder of 12 April 1995 and the Organization's surrejoinder of 19 June 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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 Frenchman born in 1946, joined the staff of CERN at 1 January 1974. He was a laboratory electronics technician at grade 7. He was promoted as from 1 July 1980 to grade 8 as a technical assistant. As from 1 January 1983 he was assigned to the LEP Division. At 1 July 1987 he was promoted to grade 9 on a post of principal technical assistant and at 1 January 1990 he was transferred to a division known as SL.

On 24 August 1990 CERN issued a notice of vacancy, No. SL-RFL-90-78-IN, announcing an internal competition for a post as electronics engineer or physicist in SL. The post was to be at grade 9 or 10 and in occupational category 2, but the notice explained that the title, grade and code might change according to the incumbent's education and years of experience. No engineers or physicists having applied, the Leader of SL offered the complainant in the spring of 1991 an assignment in the Radio-frequency group (SL-RFL) to which the vacant post belonged. By a memorandum dated 11 April 1991 the Leader of SL confirmed the complainant's transfer as from 15 April 1991 so as "to give the group the technical support it needs to carry out [its] plan for development of the LEP project".

On 21 June 1991 CERN decided on a new scheme for "merit-oriented advancement", known as MOAS, and the scheme came into force at 1 August 1991. Every staff member was to be put on a "career path", each comprising grades and steps. At the time the complainant held grade 9 and his duties were in category 3, which corresponded to career path VI. The vacant post was in category 2 and therefore to be put on path VII.

By a notice of administrative action dated 27 August 1991 the Leader of the Personnel Division notified to the complainant confirmation of his formal transfer to SL-RFL at 1 September. He sent it back duly signed but with the comment: "Transfer agreed provided duties are changed as shown in the attached [Personnel action form] and notice of vacancy". The form indicated that notice SL-RFL-90-78-IN had been revised, SL having removed one of the prescribed duties.

By a letter of 3 December 1991 the complainant told the Leader of the Personnel Division that, having got no answer, he took it that his transfer to the advertised post with the change in duties had taken effect "in category 200 and so ... on path VII".

At a meeting on 28 January 1992 representatives of SL and Personnel gave him to understand that his new assignment brought about a change in duties that afforded an "opportunity of access to a higher level than before". By a letter of 3 February the head of Personnel Services told him that that was so, though the Technical Engineers and Administrative Careers Committee (TEACC) would have to approve any move to path VII.

By a letter of 14 February 1992 the Leader of the Personnel Division informed him that in keeping with the "Instructions for the designation of career paths to present staff members", issued on 3 October 1991, he would be on path VI as from 1 March 1992.

In a letter of 28 March 1992 to the head of Personnel Services he expressed disagreement with the terms of the letter of 3 February.

SL proposed changing his career path, and the matter went to the TEACC in 1992. It recommended keeping him on path VI. In 1993 it reviewed his case and in a report of 16 October reached the same conclusion. The decision was notified to him in November 1993 on a "job information form".

By a letter of 2 December 1993 to the Director-General he lodged an appeal with the Joint Advisory Appeals Board. In its report of 27 May 1994 the Board recommended keeping him on path VI. By a letter of 21 June 1994, the impugned decision, the Director-General informed the complainant that he had endorsed the recommendation.

B. The complainant has four pleas.

The first is that the impugned decision rests on a mistake of fact. The Director-General acted on a recommendation by the TEACC, which was wrong to describe his duties as consisting "mainly of adapting existing hardware and software". When he joined SL-RFL only the hardware had been installed.

His second plea is that the TEACC got the procedure wrong too: only two of its members saw him and were able to assess his work properly.

Thirdly, he pleads breach of a promise he got on transfer to put him on path VII. Post SL-RFL-90-78-IN, the one he says he was appointed to, was plainly said to be on that path. So CERN committed a breach of trust.

Lastly, CERN broke Staff Regulation R II 2.07, which requires a change of career path when someone "permanently assumes duties which correspond to those defined for another career path". Since transfer the complainant's duties as set out in the post description do warrant path VII.

He asks the Tribunal to set aside the decision to put him on path VI and declare his right to path VII. He claims moral damages and costs.

C. In its reply CERN denies making him any promise over his transfer to post SL-RFL-90-78-IN. No-one ever offered him such transfer or said he would be in category 2. He does not have the sort of formal qualifications that that category calls for. All he was promised was assignment to SL-RFL with new duties as a senior technical assistant in category 3. At the time the Leader of SL explained to him that changing to path VII would mean going through the TEACC procedure.

CERN contends that there was no question of applying R II 2.07 since, as the TEACC twice pointed out, he was not permanently carrying out duties corresponding to path VII.

CERN made no mistake of fact. The TEACC was quite able to assess his work "properly", and it did consist in bringing software into use by "adapting" it.

There was no breach of procedure: the rules lay down no special procedure for the TEACC, which acted in this case in line with custom.

D. The complainant maintains in his rejoinder that the Leader of SL expressly offered him assignment to post SL-RFL-90-78-IN, which was on path VII. That he did not have the proper qualifications is neither here nor there since none of the applicants did anyway.

Since his grade, which is 9, is the highest on path VI, a change of path would open up a new career for him.

Though his duties are not as extensive as those in the original notice they are still those of an engineer, and his supervisors have acknowledged that he is performing the duties of the post. He asks the Tribunal to discount an item appended to CERN's reply and headed "Post description".

E. In its surrejoinder CERN presses its pleas and submits that even if it had put him on the post it would have had to change the title and grade because he lacked the university qualifications required.

CONSIDERATIONS:

The background

1. The complainant has been with CERN since 1 January 1974. He has a diploma of senior technical studies and a certificate in robotics. CERN recruited him as a "laboratory technician (electronics)" at step 2 in grade 7. By 1 July 1987 he had reached grade 9 as a senior technical assistant (electronics). At 1 January 1990 he was transferred to a division known as SL.

2. In August 1990 SL put up for internal competition a post in a group, RFL, for an electronics engineer or physicist, who was to help in developing and maintaining instruments to control a radio-frequency system. The notice of vacancy was SL-RFL-90-78-IN.

3. CERN brought in a "merit-oriented advancement scheme" (MOAS) for the advancement of staff along "career paths". Posts are put on such paths, each of which consists of grades. When permanent duties so change as to match the path no longer, the path changes.

4. The complainant's duties were declared to warrant path VI (occupational category 3), which comprises grades numbered 7, 8, 9 and, for staff of outstanding merit, 10. Path VII corresponds to grades 9 and 10. It is for qualified engineers and physicists, but is also open to technicians who have developed skills on the job and who have been carrying out equivalent duties, provided that a technical body appointed for the purpose, the TEACC, gives its approval. As described in the notice the post carried the code number 204/211, which put it in occupational category 2, and corresponded to grades 9 and 10. But the official form stated: "The title, grade and code are subject to change according to education and the number of years' experience".

5. No engineers or physicists having applied for the post, the Leader of SL approached the complainant in the spring of 1991 and offered him transfer to SL-RFL. Having little hope of promotion if he stayed on path VI, the complainant expressed interest in the post in the belief that carrying out the duties of an engineer or physicist would help to put him on path VII. He accepted. In a memorandum of 11 April 1991 the Leader of SL confirmed the change of duties, which was to be provisional for three months, and said:

"You will be giving the group technical assistance in carrying out its programme of development for the LEP project. Your experience and skills will be great assets ... After the trial period, and if both you and RFL agree, you will get formal transfer. A new post description will then be made and put to the Personnel Division for entry in your personal file."

In his reply of 15 April 1991 the complainant confirmed several points and thanked the Leader for his support. At the end of the trial period a notice of administrative action from the Personnel Division, dated 27 August 1991, confirmed his new duties as from 1 September 1991. On 29 September 1991 he signed the form and sent it back with the comment: "Transfer agreed provided duties are changed as shown in the attached [Personnel action form] and notice of vacancy". He appended a draft form dated 16 August 1991 which announced "Change of group from 1 September 1991 with change of duties from SL-PC to SL-RFL (Post SL-RFL-90-78-IN changed, see attached copy of vacancy notice)". On the appended notice one of the original duties - "the overall control of the LEP's RF system from the Prévessin Control Room" - had been struck out in ink. CERN did not respond at once. On 3 December 1991 the complainant wrote to the Leader of the Personnel Division citing his own qualified consent and saying:

"After waiting for 60 days I understand that my transfer with a change in duties has taken effect on the stated post (SL-RFL-90-78-IN) in category 200 and so, in line with new personnel policy, on path VII."

He asked for written confirmation of his new career path. On 18 December 1991 a personnel officer rejected his point of view and said that the decision had made no difference to his contractual status.

6. There followed meetings and correspondence on the subject. The complainant insisted that the transfer entailed a change in duties which gave him under Staff Regulation R II 2.07 the right of access to path VII; CERN maintained that under the rules, including administrative circular 26, headed "Annual interview, advancement and change of career path", and the annexes thereto, any change from path VI to VII was subject to review by the TEACC. In a letter of 3 February 1992 CERN told him:

"As was agreed by those concerned, your transfer to SL-RFL as from 1 September 1991 meant a change in duties and the opportunity of access to a higher level than before. ... In some respects your duties were akin to those set out in the notice about post SL-RFL-90-78-IN ... If SL are satisfied that all the duties of the post are now tending

towards path VII it may make a proposal to the TEACC in the context of the yearly staff review, since you will have been on the post for at least one year."

He demurred.

7. A notice of administrative action of 21 February 1992 granted him another step to bring him to the fifth in grade 9. He later rose to steps 6 and 7. It is not in dispute that his supervisors found his performance quite satisfactory.

8. SL having proposed a change of path, the TEACC took up his case in 1992. It concluded:

"TEACC feels that, while the developments which R. B. made in the PC group are technically outstanding and very successful, he is not yet operating at engineer level in his present post. It is recommended that he remain on Career Path VI for the present and that his case be re-examined when he has had an opportunity to fully develop his capabilities."

9. His case came up again in 1993, and this time the TEACC reported:

"Following a presentation to TEACC last year, it was decided that he should be reconsidered in 1993. TEACC appreciates the thoroughness of Mr. B.'s efforts, based on solid technical skills. He is efficient, documents well and has a well earned reputation of providing reliable equipment in the foreseen time scale. However more extensive contacts with other groups working in the same field would be beneficial. We detect that he has the potential to take on further technical challenges but we do not think that his abilities are exploited in his present environment. TEACC considers that the complexity of his present tasks, which consist mainly of adapting existing hardware and software, corresponds to the level of a senior technician and therefore recommends that Mr. B. be confirmed on Career Path VI."

10. On 2 December 1994 the complainant appealed to the Director-General against the decision not to put him on path VII. In its report of 27 May 1994 the Joint Advisory Appeals Board pointed out, among other things, that SL had not ruled out a change of path for him but had felt he did not have all the qualifications, in particular the academic ones. The Board compared the purportedly mandatory wording of Regulation R II 2.07 - "A change of career path shall occur ..." - with circular 26, which makes a change from path VI to VII conditional on going through the TEACC. It held that, though the two rules were not on a par in law and the circular could not derogate from the Regulations, there was only a seeming inconsistency between the two. Staff Rule I 1.05 empowered the Director-General to issue circulars to apply the Staff Regulations, circular 26 was an essential part of MOAS, and the TEACC's approval was necessary for a move from path VI to VII. So the circular was no derogation from the Regulations but a supplement thereto. The Board's recommendation reads:

"On the basis of the foregoing comments the Board unanimously recommends keeping Mr. B. on path VI.

In view of the favourable comments both TEACC commissions have made the Board hopes very much that Mr. B. and his supervisors will find a way to organise and define his duties so as to ensure that R. B. wins the TEACC's approval in the near future.

In view of inconsistencies between Regulation R II 2.07 and circular 26 the Board hopes that the Regulations will be revised so as to clarify the position."

By a decision of 21 June 1994 - the one now impugned - the Director-General endorsed the Board's recommendation and kept his earlier stance.

11. The complainant has four pleas:

The impugned decision rests on a mistake of fact: the TEACC was wrong to take the view that his duties consisted merely in "adapting" software. He found the software not yet in use and had to do far more than adapt it.

The procedure too was wrong. The full TEACC did not give him a hearing; only two of its members saw him, and he was not shown their findings.

The decision was in breach of Regulation R II 2.07. That provision alone applies - not circular 26 - and he qualifies under it.

CERN made him a promise at the time of transfer and has not kept it.

12. CERN seeks to refute each of his pleas.

It made, it says, no mistake of fact. Though the software was not in use when he came and he did have to get it going, that is just the kind of work that adapting software entails. Neither the TEACC nor the Director-General made any mistake of fact.

The written rules lay down no special procedure for the TEACC. The custom is for it to have one of its members report with help from an assessor who belongs to the staff. It has an internal report on each case. If necessary, it orders further submissions. There was nothing wrong with the procedure in this case.

The complainant is mistaken in saying he qualified under Regulation R II 2.07. His present duties are neither an engineer's nor a physicist's, as path VII requires, nor permanent.

The Organization made him no promise it has failed to keep. His new duties only partly matched the description in the original notice, one important item of which has gone. And there was no other promise. CERN explained to him that, subject to the rules about changing career paths, his transfer afforded an "opportunity of access to a higher level than before":

"The Organization offered the complainant hopes of advancement and a change of path ... That may have aroused his interest in the assignment. ... His duties in his new group are still technical."

The Appeals Board's recommendation for giving him more taxing work

"... was ultra vires: the Board is supposed to report on the lawfulness of the challenged decision, not meddle in personnel management. And SL was not free to treat him better than other technicians with like qualifications and expectations."

13. The complainant asks the Tribunal to discount appendix 7 to CERN's reply - a post description - on the grounds that he has never seen it before. CERN says that it was in his personal file, but not that he had actually seen it. At all events it is of no detriment to his present case.

14. A decision determining a career path in accordance with CERN rules is analogous to a decision about grading. A long line of precedent leaves such a decision to the Director-General's discretion. So the decision must stand unless it was taken without authority or in breach of a formal or procedural rule, or rests on a mistake of fact or of law, or overlooks some material fact, or is tainted with misuse of authority, or unless an obviously wrong conclusion has been drawn from the evidence. And the Tribunal's own assessment of the evidence may not replace the Director-General's: see for example Judgment 1281 (in re Saunders 7).

15. The complainant is not actually challenging as such any appraisal the Director-General based on the TEACC's findings. The pleas he does put forward are limited in scope and are admissible in a case of this kind. He objects, for example, to the TEACC's failing to report that he had much more to do than just "adapt" software: he had to make it work. CERN does not deny that the job was a big one; it was, however, "adaptation" in the broadest sense. The complainant fails to show, and it is not self-evident, that the shift of emphasis would have sufficed to put his duties on a par with an engineer's or a physicist's. So the plea fails.

16. His objections to the procedure in the TEACC and its way of delegating authority seem to rest on two circumstances: that only two of its members spoke to him and that he never saw their findings. But he is neither challenging the basis of the procedure in law nor - apart from the point dealt with in 15 above - making any specific criticism of the findings that the Committee adopted on the strength of the assessment it had had carried out.

17. The plea again fails. Delegation of authority to look into a case - here the work was done by one member of the Committee with help from an assessor - is often a sensible approach: findings obtained by delegation may afford the competent body just the facts it needs. Besides, the complainant fails to show how the procedure may have impaired his rights.

18. Regulation R II 2.07 reads:

"A change of career path shall occur when a member of the personnel permanently assumes duties which correspond to those defined for another career path. ..."

Staff Rule I 1.05 says:

"In the application of the Regulations, the Director-General may publish administrative circulars, after consulting the Standing Concertation Committee provided for in Chapter VII."

And circular 26 provides:

"VI. CHANGES IN CAREER PATH

(Articles R II 2.01 and R II 2.07 - Annex R C 1)

13. At least 12 months after a staff member has taken up new major duties, his division leader (or equivalent) shall review the situation on the occasion of the next appraisal exercise. If he believes that a change of career path is justified, he shall seek the endorsement of the relevant director(s) and send a request to that end to Personnel Division which studies it and may authorize the change. A staff member may also submit a request giving grounds for a change of career path, via his division leader, to the Leader of Personnel Division. Normally, a change of career path may take place after the staff member has reached the last grade of the normal advancement zone of the career path.

14. Changes from Career Path VI to Career Path VII are subject to prior study by the 'Technical Engineers and Administrative Careers Committee' (TEACC), whose composition, mandate and procedural guide-lines are given in Annex III. However if, following the publication of a post vacancy notice in Career Path VII, a staff member with a recognized university qualification is assigned to this career path as the result of a selection procedure (Article R II 1.03), the opinion of the TEACC is not required."

19. The complainant fancied that his transfer, as notified to him on 27 August 1991, must mean a permanent change of duties within the meaning of R II 2.07 because the original notice of vacancy, which called for candidates with university qualifications in electronics, robotics or physics, coded the post "204/211" and put it in grade "9/10". To his mind the change of duties alone entitled him to path VII.

20. He is wrong: as CERN submits, both fact and law are against him. A change of duties confers the right to a change of paths under R II 2.07 only if the new duties warrant another path. To apply that to the complainant's case, a technician who is on path VI must have permanent duties equivalent to those of someone with university qualifications as an engineer or physicist. It is mistaken to impute to CERN an acknowledgement from the outset that after transfer the complainant would be doing work in category 2. Besides, the original notice of vacancy mentioned the possibility of putting the post in another category and grade if the successful applicant's qualifications so warranted. And CERN gave the complainant lesser duties than those in the original notice. The plea cannot be sustained.

21. The complainant infers from CERN's handling of his case a promise that he could change paths later and he says it has not kept its promise. The case law sets several conditions for the enforcement of a promise: it must be a substantive one, to act or not to act, or to allow; it must come from someone competent to make it; whoever relies on it must suffer injury for the breach; and the position in law must not alter between the time of the promise and the time when it is to be discharged. The form it takes - be it written or oral, express or implied - is immaterial: see Judgments 782 (in re Gieser), 1040 (in re Douglas) and 1278 (in re Rogatko).

22. In this case the complainant has failed to show that CERN made him any enforceable promise to put him on path VII upon transfer.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Mella Carroll
Egli
A.B. Gardner

Updated by SD. Approved by CC. Last update: 5 October 2007.