Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

106th Session **Judgment No. 2809**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. S. against the European Organization for Nuclear Research (CERN) on 22 October 2007 and corrected on 6 February 2008, the Organization's reply of 22 May, the complainant's rejoinder of 30 July and CERN's surrejoinder of 30 September 2008;

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 Swiss national born in 1965, worked at CERN from 25 September 1993 to 28 February 1997 as an associated member of the personnel, then from August 1997 to August 1999 as a fellow and from September 1999 to July 2001 again as an associated member of the personnel. On 1 July 2001 he was recruited as a staff member on a three-year limited-duration contract as a physicist (computing). He was assigned to career path VII, grade 9, step 4. Following the introduction by CERN of a new career structure, he

was assimilated into career path E, salary band b, position 5, as from 1 September 2001. His contract was renewed for three years from 1 July 2004 to 30 June 2007 and he was then granted an exceptional extension of this contract from 1 July 2007 to 31 December 2007, when he left the Organization.

In the meantime, at the beginning of 2006, three long-term jobs for information technologists became available within the Physics Department's manpower plan. By an e-mail of 21 April 2006 the Human Resources Department proposed that the complainant should be assessed by the Departmental Contract Review Board (DCRB) for the award of an indefinite contract. A description of the activity concerned was attached to this e-mail, as was Administrative Circular No. 2 (Rev. 3) which explained in detail the applicable criteria and new procedure. At the end of this assessment the DCRB considered that the complainant met all the criteria of the circular, but it was critical of his communication skills. The Director-General informed the complainant by a letter of 16 October 2006 that he had decided not to award him an indefinite contract.

On 12 December 2006 the complainant appealed against this decision. In its report of 4 July 2007 the Joint Advisory Appeals Board recommended that the appeal be dismissed. By letter of 24 July 2007 the Director of Finance and Human Resources, acting on behalf of the Director-General, informed the complainant that he had decided not to award him an indefinite contract. That is the impugned decision.

B. Relying on both the Tribunal's case law and the texts in force in CERN, the complainant submits that a vacancy notice concerning an indefinite contract for a specific job, rather than the range of jobs covered by the term "applied physicist/software engineer", ought to have been published and that the job description should have been adjusted accordingly. Moreover, he is of the opinion that the document on which the disputed decision rests is not that which should have been taken into consideration. He infers from these

elements that the decision was preceded by serious procedural flaws.

The complainant states that owing to the vague job description he had been sent, and in the absence of a vacancy notice, he did not know for which post and on what conditions he was competing. He contends that the impugned decision therefore breaches the requirement of reciprocal trust.

He further claims that he was not ranked among the best candidates because of the manner in which the assessment interview was conducted and that his excellent performance, as attested by his appraisal reports, was disregarded. He therefore holds that the DCRB drew manifestly erroneous conclusions.

Lastly, the complainant submits that there is a major contradiction in the contract policy reflected in Administrative Circular No. 2 (Rev. 3) which results in a misuse of procedure. He argues in particular that the impugned decision conflicts not only with the terms of the above-mentioned circular, but also with the principle that staff members must have equal chances of obtaining an indefinite contract.

The complainant asks the Tribunal to set aside the decision of 24 July 2007 and to order CERN to reconstitute his career as from the date of his termination and to award him an indefinite contract as from that date. Failing that, he asks the Tribunal to order CERN to pay him the equivalent of five years' salary and pensionable allowances. He also claims costs.

C. In its reply the Organization asserts that Administrative Circular No. 2 (Rev. 3) makes it clear that the obligation to publish a vacancy notice applies solely to the initial recruitment of staff members. It fails to understand how the non-publication of a vacancy notice could have injured the complainant, since he was actually assessed for the award of an indefinite contract and this assessment was conducted in accordance with the procedure laid down in the circular.

CERN submits that the complainant knew perfectly well for which post and on what conditions he would be assessed, since he had

received a description of the activity concerned and the applicable procedure by e-mail on 21 April 2006. He had also been informed that he would be assessed together with other candidates whose profiles were similar to his.

The Organization emphasises that a candidate's annual appraisal reports are only one of the factors taken into account by the DCRB.

Lastly, it denies any misuse of procedure. It explains that the complainant simply did not appear to be one of the three best candidates to whom an indefinite contract could be awarded.

D. In his rejoinder the complainant enlarges on his pleas. He maintains that in his case procedural irregularities arose from the lack of details about the available posts, which resulted in an obvious lack of transparency in the selection process. He alleges that the impugned decision was based on an assessment report drawn up by the DCRB which contained manifestly erroneous conclusions. He considers that he has proved that this decision was tainted with a misuse of procedure.

E. In its surrejoinder CERN reiterates its arguments.

CONSIDERATIONS

1. The complainant joined CERN in 1993. On 1 July 2001 he became a staff member with a three-year limited-duration contract as a physicist (computing). This contact was renewed for a further three-year period ending on 30 June 2007. Having been granted a final six-month extension, he left the Organization on 31 December 2007.

2. In 2006 the Organization's contract policy changed. Its new policy is described in Judgment 2711, delivered on 6 February 2008, to which reference should be made. Under this new policy limited-duration contracts could be converted into indefinite contracts on the conditions established by Administrative Circular No. 2 (Rev. 3)

of January 2006. According to paragraph 50 of this circular, "[t]he 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". However, paragraph 49 makes it clear that, in order to be awarded an indefinite contract, "[a] staff member shall be assessed according to the personal criteria only where it is established that the activity-linked criteria are fulfilled". Under paragraph 51 the personal criteria are: performance, conduct, initiative, commitment and flexibility, ability to integrate and ability to communicate. And paragraph 52 states that "[i]n addition, the staff member must demonstrably possess the potential required to make a valid contribution to the Organization's mission in the long-term by making satisfactory progress in his current functions as well as in other fields".

On 21 April 2006 the complainant received an e-mail from the Human Resources Department suggesting that he should be assessed by the Departmental Contract Review Board (DCRB) with a view to being awarded an indefinite contract. The interview for this purpose took place on 22 May 2006. In its report of 3 July 2006 the DCRB concluded in substance that the complainant met all the criteria for long-term employment, but that he could not be ranked among the best candidates fulfilling those criteria.

On the basis of this report the Head of the Physics Department proposed to the Head of the Human Resources Department that the complainant should not be awarded an indefinite contract.

In accordance with paragraph 59 of the above-mentioned circular, the Head of the Human Resources Department submitted the proposal not to award the complainant an indefinite contract to the other Department Heads for possible comments. They did not comment on the proposal. The Executive Board, which was then consulted by the Director-General, recommended that he should not award an indefinite contract to the complainant.

On 27 July 2006 the Head of the Human Resources Department informed the complainant of the Executive Board's negative

recommendation, forwarded the DCRB's assessment to him and invited him to submit any comments he might have.

The complainant submitted his comments in a letter of 4 August 2006. That same day two of his supervisors also sent some comments concerning his assessment by the DCRB to the Head of the Human Resources Department. In the light of the comments from the complainant and his supervisors some adjustments were made to the assessment report drawn up by the DCRB. The complainant's comments and those of his two supervisors, as well as the corrected version of the DCRB's report, were appended to the file forwarded to the Director-General for a final decision.

The Director-General informed the complainant by letter of 16 October 2006 that he had decided not to award him an indefinite contract. On 12 December 2006 the complainant appealed against this decision, but requested exemption from proceedings before the Joint Advisory Appeals Board on the grounds that the issues raised were essentially of a legal nature. This request having been denied, the Board convened on 6 June 2007 and unanimously decided to recommend that the Director-General should dismiss the internal appeal.

By a letter of 24 July 2007, which constitutes the impugned decision, the Director of Finance and Human Resources, acting on behalf of the Director-General, informed the complainant that he had decided to follow the recommendation of the Joint Advisory Appeals Board and therefore to uphold the decision of 16 October 2006.

3. The complainant principally requests the setting aside of the impugned decision and he enters four pleas in support of his complaint. He submits that the procedure followed was flawed, that the Organization breached the requirement of reciprocal trust, that the disputed decision rests on manifestly erroneous conclusions and that the decision is tainted with misuse of procedure.

4. The complainant contends that the procedure applied in this case was flawed because the Organization did not comply with its duty

to publish a vacancy notice, his own comments were written then forwarded to the Head of the Human Resources Department after the Executive Board had recommended that the Director-General should not award him an indefinite contract, and the document on which the disputed decision rests is not that which should have been taken into consideration.

(a) With regard to non-compliance with the duty to publish a vacancy notice, the complainant, relying on the Tribunal's case law and Administrative Circular No. 2 (Rev. 3), submits that a vacancy notice concerning an indefinite contract for a specific job ought to have been published and that the job description should have been clarified accordingly. In the instant case he states that he was informed by e-mail only that a long-term job as "applied physicist/software engineer with extensive expertise and experience in one or more of the […] domains [indicated]" was available in 2006 in the Physics Department and that he "was merely sent an attachment containing a sketchy description of some very diverse activities matching not one post […] but several quite different posts".

However, the Tribunal notes on reading Administrative Circular No. 2 (Rev. 3) that, contrary to the complainant's assertions, the procedures differ depending on whether it is a question of recruiting a staff member or awarding an indefinite contract to a staff member already working in the Organization.

Chapters II and III of this circular provide for the publication of vacancy notices "on the Internet and, where appropriate, in the press or via other channels likely to attract qualified [internal or external] candidates". These provisions apply when recruiting staff members, but not where an indefinite contract is to be awarded to a staff member, as in the present case, this being one of the "Possible developments regarding the contractual position" mentioned in Chapter VI of the above-mentioned circular. In this case it is sufficient to advise staff members eligible for assessment for the award of an indefinite contract that one or more long-term jobs exist in their field of activities within the manpower plan of their department. This was done and the complainant did not raise any objections to being

assessed in accordance with the terms and procedure laid down in Administrative Circular No. 2 (Rev. 3).

Contrary to the complainant's allegations, it cannot therefore be said that the procedure was conducted in breach of the relevant texts or that it was contrary to the Tribunal's case law on which the complainant relies, which does not apply here.

(b) The complainant points out that the procedure followed by the Organization does not enable assessed candidates to comment on the DCRB's assessment report until after the Executive Board has given its opinion to the Director-General. It was this modus operandi which led the Joint Advisory Appeals Board to suggest that consideration should be given to changing the order of the procedure so that applicants could comment on the DCRB's report immediately after it was issued.

While the Joint Advisory Appeal Board's suggestion seems logical, in the present case the Organization did not do anything improper, since the procedure followed was that laid down in Administrative Circular No. 2 (Rev. 3), paragraph 61, which is still in force and which respects the right to be heard, since the person concerned can apprise the Director-General of his or her comments before the latter takes a final decision.

(c) The complainant submits that the decision not to award him an indefinite contract was tainted with serious procedural flaws. He considers that the fact that there were two assessment reports from the DCRB had considerable repercussions on the selection procedure. In his opinion, the document on which the decision in question rests was not that which should have been taken into consideration.

Having examined the submissions, especially the Director-General's letter of 16 October 2006, the Tribunal concludes that it was the second version of the DCRB's report, which took account of the comments of the complainant and his two supervisors, that formed the basis of the Director-General's final decision. This third argument therefore fails.

It follows from the foregoing that the first plea is unfounded.

5. The complainant taxes the Organization with breaching the requirement of reciprocal trust. He recalls in this connection that the Tribunal has always held that trust and fairness must govern relations between an international organisation and the members of its staff, and that it has made frequent reference to mutual trust or to the principle of the protection of legitimate expectations. The complainant considers that in the present case the decision not to award him an indefinite contract is tainted with an "obvious lack of transparency" in that "the document showing the number of filled and vacant posts, which was introduced by the [Organization's] new contract policy and which was called a manpower plan, was not brought to the attention of staff" although it was used to justify the assessment of candidates for the post in question; in that the Executive Board's recommendation forming the basis of the Director-General's decision not to award him an indefinite contract was not transmitted to him; in that numerous questions relating to the competition itself have not been answered; and, lastly, in that he did not know for which post and on what conditions he was competing.

(a) The argument that the manpower plan was not communicated to the staff will not be entertained, since the construction to be put on the wording of paragraph 50 of Administrative Circular No. 2 (Rev. 3) is that the Organization's sole duty when deciding whether to award an indefinite contract to a staff member is that it must inform him or her that "there is at least one long-term job available for the activity concerned within the manpower plan of the Department concerned". Since the complainant was informed by e-mail on 21 April 2006 that he could be assessed for a long-term job available in his department in 2006, the Organization must be deemed to have fulfilled its duty.

(b) With regard to the failure to transmit the Executive Board's recommendation, the complainant states that the only information he received about this recommendation was that "the Director-General ha[d] consulted the Executive Board and consequently d[id] not recommend that [he] be awarded an indefinite contract".

The Tribunal notes, on reading the letter of 27 July 2006 from the Head of the Human Resources Department and the complainant's reply

of 4 August 2006, that he was in fact apprised of the Executive Board's recommendation which, moreover, he contested.

(c) The complainant takes the view that many questions regarding the competition remain unanswered. He emphasises that he was not informed of the number of posts available and that the job description(s) and the conditions on which he was competing were vague.

However, the Tribunal considers that the question of the number of available jobs is irrelevant here, for the complainant could be assessed provided that at least one long-term job was available in his field of activities, in accordance with paragraph 50 of Administrative Circular No. 2 (Rev. 3).

The evidence on file, especially the e-mail of 21 April 2006, shows that the complainant did receive a description of the activity in question and the above-mentioned circular. He was thus adequately informed about the activity for which he would be assessed and the conditions on which this assessment would take place. What is more, he was expressly invited in a memorandum of 9 May 2006 to seek any further information he might need about the selection procedure, a step which he did not consider necessary.

The Tribunal concludes from the foregoing that the plea that the requirement of mutual trust was breached is likewise unfounded.

6. The complainant submits that the decision of 16 October 2006 rests on a report containing manifestly erroneous conclusions, since he considers that the DCRB's recommendation that he should not be ranked among the best applicants was simply "astonishing in view of [his] excellent appraisal reports". He draws attention to the very favourable comments of his supervisor in his latest appraisal report (that of 2006). He emphasises that his group leader is particularly complimentary about him and that, according to his reports for 2002 and 2003, the quality of his work was considered to be "above expectations". He also points out that in their letter of 4 August 2006 his supervisors formally contested the DCRB's criticism of his performance and of his commitment and flexibility. As

far as his ability to communicate at all relevant levels is concerned, he is convinced that the DCRB would have preferred "a slide show", yet this was merely optional and not obligatory. Lastly, he considers that the procedure leading to the decision not to award him an indefinite contract was not conducted with the requisite care.

The Tribunal has consistently held that a good performance record does not in itself justify selecting one candidate rather than another for a promotion or for the award of a post. The opinion of the author of an annual appraisal cannot be substituted for the conclusions of a selection board which, in this case, comprised representatives of the department head concerned, two human resources coordinators and two experts from another department, and which was responsible for selecting the candidates who had to be ranked as the best for the award of an indefinite contract (see, for example, Judgment 2040).

The Tribunal finds that, insofar as the DCRB concluded that the complainant met the criteria of Administrative Circular No. 2 (Rev. 3) for the award of an indefinite contract, the complainant's annual appraisal reports were taken into account, and that due regard was had to his comments and to those of his supervisors when the DCRB's report was amended before it was submitted to the Director-General for a final decision. Nevertheless, all these factors were not enough for the complainant to be ranked among the three best applicants who were to be offered an indefinite contract, since only a limited number of jobs were available.

In accordance with its case law, the Tribunal will not assess the candidates on merit or rule on the Organization's choice (see in particular Judgment 1497).

The argument regarding the lack of "a slide show" which allegedly gave rise to an adverse assessment of the complainant's ability to communicate will not be entertained as it is unsubstantiated. The Tribunal considers that the allegation that the assessment was not conducted with due care has been answered by the above finding that this assessment complied with the rules established by Administrative Circular No. 2 (Rev. 3), since it lies within the discretion of each organisation to set its own rules for conducting an assessment.

7. The complainant submits that a major contradiction inherent in the contract policy reflected in Administrative Circular No. 2 (Rev. 3) results in a misuse of procedure. He asserts that according to paragraph 50 of the circular "personal criteria should […] be examined only if a job exists [*sic*]". However, paragraph 56 stipulates that where there are not enough jobs, the Organization will retain only the best staff members. To put it plainly, the complainant taxes the Organization with using the procedure for awarding an indefinite contract, which has been turned into a competition, "to conceal the abolition of posts and achieve savings from this deceit by an unlawful lack of transparency".

The Tribunal sees no contradiction between paragraphs 50 and 56 of the above-mentioned circular, and finds that the complainant is making mere allegations without adducing any proof of a misuse of procedure, which may not be presumed.

8. The conclusion is that since none of the complainant's pleas succeeds, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet