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

FORTY-EIGHTH ORDINARY SESSION

In re BERTHET

Judgment No. 491

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organization for Nuclear Research (CERN) by Mr. Didier Berthet on 10 July 1981 and brought into conformity with the Rules of Court on 22 July, CERN's reply of 31 October, the complainant's rejoinder of 20 January 1982 and CERN's surrejoinder of 30 March 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05, Rules II 1.05, III 1.01 and 1.03 of the CERN Staff Rules and Regulations of 1968 and Regulations II 1.17 and VIII 2.06 of the Staff Rules and Regulations of 1980;

Having examined the written evidence and considering unnecessary the oral proceedings suggested by the complainant;

Considering that the material facts of the case are as follows:

A. On 21 March 1980 the Chief of Personnel of CERN informed all members of the staff holding a contract prescribing a working week in excess of 40 hours that, in accordance with the decisions of the CERN Council, contractual hours were to be reduced with effect from 1 April 1980 to 40 a week. In return, and in accordance with Regulation VIII 2.06 which came into force in 1980, it was decided to grant those staff members (a) special personal allowances by way of compensation for reduction in income, and (b) additional contributions to be paid by CERN to the pension fund. The complainant, who joined the staff at grade 4 and was employed in a division known as "SB", had a contract dated 18 December 1972 which, in accordance with the Staff Rules and Regulations then in force, provided for a 40-hour working week, but did not expressly prescribe it. From 2 January 1973 until 31 March 1980, however, he actually worked a 44-hour week. On 19 March 1980 he applied to the Director-General for the benefit of the compensatory measures.

On 14 April his claim was rejected and on 5 May 1980 he appealed to the Joint Advisory Appeals Board. On 30 March 1981 the majority of the Board recommended granting him the additional contributions to the pension fund but not the special personal allowance compensating reduction in income. On 14 April 1981 the Director of Administration rejected the appeal on behalf of the Director-General, and that is the decision now impugned.

B. The complainant argues that as in practice he regularly worked 44 hours a week for several years his position may be assimilated to that of holders of contracts prescribing a 44-hour week, and he should therefore benefit from the compensatory measures. He contends that the four hours which he worked, on the instructions of his supervisors, in excess of 40 a week were not overtime, which should be of an exceptional nature, but "additional". He also produces a text signed by CERN officials and by the Director-General, dated 29 November 1972 and headed "Selection Memo", which bears a handwritten note: "contract of 40 h/w offered by the Division: Mr. Berthet has been informed that in fact he will work 44 h/w". In his view the provisions of the original contract documents were superseded, in respect of hours of work, by a new agreement which came into effect, by implication, by reason of the additional hours of work which CERN regularly required of him for a period of years. His position being similar to that of holders of contracts prescribing a 44-hour week, there has been breach of the principle of equality of treatment. He accordingly invites the Tribunal to quash the decision of 14 April 1981; to declare that he is entitled to the special personal allowance compensating reduction in income and to the payment of additional contributions to the pension fund with effect from 1 April 1980; and to award him costs.

C. In its reply CERN discusses the relevant provisions of the Staff Rules and Regulations which came into force in 1968 and which were applicable when the contract was concluded with the complainant. It refers in particular to Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05, and Rules II 1.05 and III 1.01. It observes that later

editions of the Staff Rules and Regulations carried over those articles from the 1968 edition, except that in the 1980 edition the article which had provided for contracts prescribing more than 40 hours a week -Regulation III 1.05 - was repealed. It concludes that all contracts and all amendments thereto were required to be in writing; that hours of work had to be stated if they differed from the basic working week of 40 hours; and that by accepting the contract the staff member undertook to be subject to the Staff Rules and Regulations. These rules are clear, in CERN's view, and there are no grounds for applying any general principle of law on which the complainant may wish to rely. There is, besides, no substance to his contention that his written contract - which he never asked to be amended to prescribe a 44-hour week - was superseded by a new, implied contract. The additional remuneration he received for overtime hours was paid in accordance with the rules governing staff on a 40-hour week. Nor has there been any breach of the principle of equality of treatment, which does not come into play unless the complainant is in the same position, both in fact and in law, as those who have received the benefits he is claiming. Moreover, the document dated 29 November 1972 on which he relies makes it plain that what he was offered was a contract prescribing a 40-hour week. To assimilate him to holders of contracts prescribing a 44-hour week would in fact be contrary to the Staff Rules and Regulations. CERN accordingly invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant develops the arguments in his original memorandum. He observes that there is no question but that his normal working hours in the SB Division were 44 a week: indeed this is borne out by the handwritten note on the document of 29 November 1972. The Staff Rules and Regulations stipulate that a staff member shall work either the hours provided for in the rules or in his contract or in excess of those hours, in which case he is on overtime. Hours regularly performed, for a period of years, in excess of the basic working week, cannot be described as "overtime". The complainant believes that he was in neither of the situations covered by the rules since his hours in excess of 40 were not overtime in the true sense. CERN imposed on him conditions which were not provided for in the Staff Rules and Regulations, and thereby acted in breach of the principle of good faith. That CERN is mistaken in contending that amendments to the contract of employment must be in writing is borne out by Regulation II 1.07 of the Staff Rules and Regulations of 1980, which states that where a staff member, for a certain period following the effective date of an amendment to his contract, performs the duties indicated therein he shall be deemed to have accepted it, even if he has not signed it. The complainant also relies on the principle of acquired rights. The payment which he received for four additional hours a-week over a period of eight years should be regarded as part of his ordinary salary and therefore constitutes an acquired right. He repeats his contention that in practice he was in the same position as holders of contracts prescribing a 44-hour week and that there has therefore been inequality of treatment.

E. In its surrejoinder CERN points out again that the complainant's contract prescribed a 40-hour week and contends that it is immaterial that other staff in the SB Division had contracts prescribing a 44-hour week. The document of 29 November 1972 did not form part of his contract of employment, but was only an internal CERN document. CERN was entitled to require him each week to perform the overtime required, and for years that was what he consented to do. Besides, the number of overtime hours varied, and it cannot therefore be argued that his normal working hours within the meaning of Regulation III 1.03 were 44 a week. CERN denies any breach of the principles of good faith or equality of treatment. It also argues that the contention that an amendment to the contract need not be in writing betrays a misunderstanding of the purpose of Regulation II 1.17 - which the complainant cites - that article being applicable only where an actual amendment has been proposed by the Administration. Moreover, there cannot be any breach of the principle of acquired rights in this instance since such a right may be acquired only under the terms of the contract or of the Staff Rules and Regulations. CERN again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. Under a contract dated 18 December 1972 the complainant joined the staff of the European Organization for Nuclear Research (CERN) as an electroplater in the Printed Circuits Section of a division known as "SB". The contract was stated to be subject to the provisions of the Staff Rules and Regulations and to other related official instructions.

The Staff Rules and Regulations which had come into force on 1 January 1968 stated: "the basic working week shall be a 40-hour, five-day week", and provided that if the actual differed from the basic working week an amendment was required to the contract to that effect accepted by both parties.

The complainant's contract contained no clause on working hours, but it is not contested that from 2 January 1973

until 31 March 1980 he worked 44 hours a week, thereby observing the same schedule as the other staff in the same workshop. Most of those appointed to the SB Division at the time were given contracts expressly prescribing a 44-hour working week.

For reasons of general policy, after consulting holders of contracts prescribing over 40 hours, and with effect from 1 April 1980, the Organization decided to reduce contractual hours to 40. The Chief of the Personnel Division proposed' to the holders of such contracts a new clause providing for compensation which was to take the form of payment of a special personal allowance and the contribution of supplementary annuities to the pension fund. The Director proposed no amendment to the complainant's contract, on the grounds that it prescribed only 40 hours a week.

2. Likening his own position to that of others whose contract specified 44 hours, the complainant applied to the Director-General for the benefit of the compensatory measures. His claim was refused on 14 April 1980. The matter was referred to the Joint Advisory Appeals Board, which recommended a compromise. The Director of Administration rejected the recommendation, however, and dismissed the claim. The complainant thereupon duly filed the present complaint claiming the full benefits granted by the Director-General to staff members who on appointment had signed a contract prescribing over 40 hours.

3. The Tribunal will determine the complainant's status by reference to the Staff Rules and Regulations and only where they are silent will it apply the general principles governing international public service.

There is no ambiguity about the texts in point in this case. Where the individual contract between Director-General and official is silent, the working week is 40 hours. But this does not preclude a requirement to do overtime work, and Regulation III 1.05 states that staff shall receive either compensatory leave or a higher rate of remuneration for hours worked in excess of 40 a week.

The same article prescribes a different system of remuneration for staff with contracts stipulating a 44- or 48-hour week: for such staff there is an increase in basic salary, not just in the rate for hours in excess of the basic week, and there is of course no compensatory leave.

4. Although the contract document signed on 18 December 1972 by the complainant and the CERN representative says nothing of working hours, the complainant has filed a text signed by competent CERN officials and by the Director-General and dated 29 November 1972. The text does state that his working hours are 40 a week, but it bears a handwritten annotation: "contract of 40 h/w offered by the Division: Mr. Berthet has been informed that in fact he will work 44 h/w". The bearing of the text is not clear, but at any rate the annotation does not appear in the contract the complainant signed. CERN observes that the text he has produced is an internal CERN document and was never notified to him. Accordingly the only contract document is the text signed by the parties on 18 December 1972.

5. The complainant points out that since appointment he has in fact been required to work 44 hours a week. The point is not in doubt and CERN admits it. The complainant infers that the discrepancy between the contract documents and what CERN actually required of him should be taken as having created a new agreement superseding the written one. He contends that there is no formal requirement, such as a written text, for an employment contract to be superseded and he has a further, and subsidiary, argument that there has been breach of the principle of equal treatment.

The Joint Advisory Appeals Board was sympathetic to his case. But the majority of the Board concluded - and necessarily so - that it was not wholly convincing, as may be inferred from their recommendation to the Director-General of a compromise based purely on what they considered to be fair.

The Tribunal will decide the case on the law and it holds that there are inescapable objections to the complainant's arguments.

Rule II 1.05 and Regulation II 1.06 state: "Every appointment shall be recorded in a contract setting out the conditions of employment"; "The contract shall indicate: ... the actual length of the working week, if this differs from the basic working week"; and "Any change in the conditions indicated above shall require an amendment accepted by both parties".

In other words, the contract may not be altered by implied or even oral agreement. The Organization may be wrong

to require an official - who wishes after all to keep his employment - to provide services not stipulated in his contract.

But that is not the case here. When the complainant signed the contract he was fully aware of the terms of employment. Thus he knew that his contractual working hours would be 40 a week and that for the four overtime hours required of him he would be entitled only to the increase prescribed for hours performed in excess of 40. He consented to those terms. The overtime payment he received was made in accordance with the rules governing staff on a 40-hour week. He may not validly contend that advantage was taken of his own good faith since, on learning the position of most of his fellow officials, he might have objected and sought the conclusion of a new contract for himself. Nor was there any abuse of authority in CERN's offering him a contract which was in accordance with the Staff Rules and Regulations.

The principle of equality of treatment is not applicable in this case. It is true that those in like position both in law and in fact should receive like treatment in law. But it is clear from the foregoing that neither in law nor even in fact was the complainant in the same position as those with contracts prescribing over 40 hours a week.

The complaint must therefore fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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