

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

FIFTIETH ORDINARY SESSION

In re BORDEAUX

Judgment No. 544

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organization for Nuclear Research (CERN) by Mr. Dominique François Michel Bordeaux on 1 July 1982 and brought into conformity with the Rules of Court on 19 July, CERN's reply of 30 September, the complainant's rejoinder of 2 November and CERN's surrejoinder of 8 December 1982;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal, Articles II 4.05, VI 1.02, R II 4.32, 5.01, 02 and 05, 6.02 and 07, and R VI 1.04 and 05 of the CERN Staff Rules and Regulations, and CERN Administrative Circular No. 9 of November 1980;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a French citizen born in 1942 and former captain of the Paris Fire Brigade, was appointed Leader of the Site Security and Fire Fighting Services of CERN under a three year contract which started on 7 May 1979. He was told in November 1980 that he was being considered for an indefinite contract. This fell through, however, and on 4 November 1981 the Director-General wrote saying that his contract would end on 31 May 1982 and that he was being put on leave with full pay to enable him to find other employment. In a letter of 2 December 1981 to the Leader of the Personnel Division he said that he regarded his suspension from duty as disciplinary because it was at odds with his excellent career record, and he asked that the disciplinary procedure prescribed in Article R II 5.02 of the Staff Rules and Regulations should be followed. This article allows for such a request where the staff member "considers there may be a presumption of culpability on his part". On 29 January 1982 the head of what was by then known as the Personnel Department confirmed the purpose of the suspension, assured him that the non-renewal did not reflect on his competence and declared that there were no grounds for following the disciplinary procedure. On 4 February the complainant appealed to the Director-General against the refusal to convene the Joint Advisory Disciplinary Board. On 12 February he was told that his case would be referred to the Joint Advisory Appeals Board in accordance with Article R VI 1.05. On 5 May the Board recommended convening the Joint Advisory Disciplinary Board. By a letter of 17 May 1982, which is the decision impugned, the Director of Administration informed the complainant that the Director-General had rejected the recommendation.

B. The complainant infers from Administrative Circular No. 9 of November 1980 a presumption of continuity of contract where the post is "of unlimited duration", as was his own. The matter of his contract ought normally to have been considered by a competent panel at the end of 1981 and a decision taken in May 1982. Had the procedure been duly completed and an indefinite contract refused, CERN would have been required by the circular to explain why, and he might then have challenged the decision. By simply letting his contract expire it deprived him of a right of appeal. In fact it had no valid reason to end his appointment, and his suspension from duty was a disciplinary measure. If not, it should have been cancelled as soon as he objected to it. Disciplinary proceedings were obviously called for, and so in accordance with Article R II 5.02 he asked the Leader of the Personnel Division to institute them. They would have enabled him to banish any doubts about his conduct and competence and to continue with the procedure for granting an indefinite contract, even if in the end such a contract had been refused. He seeks, preliminarily, the quashing of his disciplinary suspension and reinstatement with effect from 1 June 1982; a declaration that the non-renewal of contract and the refusal to institute disciplinary proceedings constituted abuse of authority; compliance with the disciplinary procedure and referral to the Joint Advisory Disciplinary Board; resumption of the procedure for granting an indefinite contract; and, subsidiarily, damages for the wrong he has suffered.

C. CERN argues in its reply that the complainant's claims are irreceivable on the grounds of failure to exhaust the internal means of redress. His only internal appeal, that of 4 February 1982, was directed against the refusal of disciplinary proceedings. He failed to challenge the decision of 4 November 1981 within the sixty days prescribed in Article R VI 1.04, and he never expressly challenged the decision of 29 January 1982 refusing disciplinary proceedings. His suspension from duty came under Article II 4.05 ("Members of the personnel may be granted special leave"), not under the rules on disciplinary measures, its purpose being to help him to find work elsewhere. The allegations of abuse of authority are unfounded. In not renewing the contract the Director-General complied with the rules and with Circular No. 9. CERN practice does not require the review of a contract at any particular date. The head of the Personnel Department, in taking his decision of 29 January 1982, acted in accordance with Article R II 5.01: under Article R II 5.02 a staff member may request, but he has no right to obtain, the convening of the Joint Advisory Disciplinary Board. There need be no fault on the staff member's part for his contract not to be renewed. Lastly, the complainant provides no proof of any injury he has sustained.

D. In his rejoinder the complainant alleges that on 8 July 1981 his division leader asked him to resign, and he believes that the reasons were his commitment to the staff union and his having pointed out grave hazards on CERN premises. His suspension, of which the whole staff was informed, was hardly likely to increase his chances of finding other work. Leave of the kind he was given is governed, not by Article II.4.05, but by R II 4.32, which requires a request from the staff member: in fact he objected to it at once. He did challenge the decision of 29 January 1982 refusing disciplinary proceedings: it was precisely that refusal he appealed against on 4 February, even though he did not actually mention that decision. Observing that he has failed to find other employment and that his wife's health has suffered, he presses all his claims for relief.

E. In its surrejoinder CERN reaffirms and develops the arguments in its reply. In particular it contends that the complainant has failed to demonstrate that the procedure followed for the review of his contract was in breach of the rules and regulations. Besides, he failed to appeal against any such breach within the prescribed time limit. The reasons he alleges for non-renewal are mistaken: he was not dismissed, and non-renewal does not imply any doubts about his competence. As to the grant of special leave, Article R II 4.32 is irrelevant because indeed the complainant did not request such leave. He was given the leave under II 4.05 and R II 6.07, which says that "The Director-General may authorize or require a member of the personnel to take special paid leave during the period of notice" of non-renewal (which, under R II 6.02, is six months). As to his request for disciplinary proceedings, he should have expressly challenged the decision of 29 January 1982. Lastly, CERN cannot be held liable for any injury he alleges to be due to the normal and lawful expiry of his contract. Indeed it helped him by granting him paid leave.

CONSIDERATIONS:

The complainant's reinstatement

1. The complainant's first claim is to reinstatement in his post with effect from 1 June 1982. This amounts to asking the Tribunal to set aside the decision not to renew his contract from that date. The Tribunal will determine whether the claim is receivable and, if so, whether it is valid.
2. Article VII of the Statute of the Tribunal sets two conditions for a complaint to be receivable: the internal means of redress must be exhausted, and the time limit must be respected.

Article VI 1.02 of the CERN Staff Rules and Regulations provides that there shall be no internal appeal against any decision not to renew a contract. There may therefore be a direct appeal to the Tribunal against such a decision, without any breach of the Statute, and whether the internal means of redress were exhausted is not a material issue in this case.

Whether the time limit was respected is a more difficult question. Article VII(2) of the Statute of the Tribunal stipulates that a complaint shall not be receivable unless it is filed within ninety days after the decision impugned was notified or published. The decision not to renew his appointment was notified to the complainant by a letter of 4 November 1981, or more than ninety days before 1 July 1982, the date on which he filed the complaint. His first claim is therefore prima facie irreceivable. However, in accordance with Article R II 5.02 of the Staff Rules and Regulations he made a request on 2 December 1981 for the institution of disciplinary proceedings to dispel the suspicion which he believed he was under; and on 4 February 1982 he appealed to the Director-General against the failure to convene the Disciplinary Board. His ultimate purpose in taking these two steps was to have the decision

of non-renewal set aside; in other words to challenge it. It would therefore be unduly formalistic to make the time limit for challenging non-renewal start on 4 November 1981. Pending a decision on the holding of disciplinary proceedings and the convening of the Disciplinary Board the complainant was under no obligation to appeal to the Tribunal against the non-renewal, a matter which he could in good faith regard as not yet settled. The time limit for impugning the decision therefore began on the date on which the Director-General took a final decision on the introduction of disciplinary proceedings and the convening of the Disciplinary Board. That date is 17 May 1982. Being filed on 1 July 1982, the complaint was filed in time and the objections to receivability fail.

3. Article R II 6.02 of the Staff Rules and Regulations reads: "A fixed-term or a term contract shall expire at the end of the prescribed period. The Director-General may renew it or not, or extend it; his decision shall be notified to the member of the personnel at least six months before the date of expiry, if the contract is of sufficient duration. Not less than three months before the said date of expiry, the member of the personnel shall inform the Director-General whether or not he accepts the new contract."

By virtue of this rule renewal is at the Director-General's discretion. That does not mean, however, that he may decide as he pleases. Indeed a long tradition of the case law has it that the Tribunal may set aside the decision if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

In this instance CERN is disregarding the restrictions on the Director-General's authority. It believes that the Director-General need provide no justification for not extending a fixed-term appointment. Not only did it fail to inform the complainant, at least in writing, of the reasons for the decision but it has said nothing whatever about them in the course of the present proceedings. In short, it acts as if the Director-General were free from any review of the exercise of his authority. It is not so. The non-renewal was therefore tainted with a mistake of law and should be quashed.

The effect of quashing the decision might be reinstatement. But this would not be the right remedy in the circumstances of the case. In particular the Tribunal bears it in mind that the complainant left CERN some two years ago and has presumably since been replaced. His reinstatement being inadvisable, the Tribunal will award him compensation under Article VIII of its Statute. It takes account of his length of service, the status of his post and the injury caused by the loss of his employment. It accordingly sets the amount of compensation *ex aequo et bono* at 30,000 Swiss francs.

The other claims

4. Since there is no reinstatement, the complainant's appointment came to an end on 31 May 1982 and the Tribunal must dismiss the claims accompanying the claim to reinstatement.

There is no point in the complainant's seeking the quashing of the decision which he describes as dismissal and which was taken before 31 May 1982.

The Tribunal need not determine whether there was abuse of authority since the non-renewal is quashed for a mistake of law.

Nor need it now settle the questions relating to the introduction of disciplinary proceedings, the convening of the Disciplinary Board and the grant of a fixed-term appointment.

The compensation claimed by the complainant has been awarded under Article VIII of the Statute. Indeed there is no other basis for such an award since he submitted no such claim to the Organization.

Costs

5. Having won on the matter of principle, the complainant is entitled to 6,000 Swiss francs as costs.

DECISION:

For the above reasons,

1. CERN shall pay the complainant 30,000 Swiss francs in compensation.
2. It shall pay him 6,000 francs as costs.
3. His other claims are 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 30 March 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner