

SIXTY-FIFTH SESSION

***In re* BAKKER**

Judgment 931

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Harmannus Bakker against the European Organization for Nuclear Research (CERN) on 11 March 1988 and corrected on 24 March, CERN's reply of 29 June, the complainant's rejoinder of 30 August and CERN's surrejoinder of 30 September 1988;

Considering Article II, paragraph 5, and Article VII, paragraphs 1 and 3, of the Statute of the Tribunal and Articles R VI 1.06, .08, .09 and .10 of the CERN Staff Rules and Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman, was at CERN for many years. In pursuance of a new staffing policy the Organization brought in at the end of 1984 arrangements for the early retirement of staff, provision being made for the payment of compensation made up of twelve months' terminal salary and the amount of the Organization's pension contributions. By a letter of 8 October 1985 the complainant applied for early retirement and on 19 December 1985 the Organization agreed. Under the CERN Pension Fund Regulations the amount of its contributions was equivalent to 15 per cent of pensionable remuneration. Having learned that for the purpose of reckoning the compensation the amount was to be reduced to 12.07 per cent, the complainant wrote on 11 September 1987 to the Director-General stating his objections. On 28 September the Director of Human Resources answered that for technical reasons he could not be paid the full 15 per cent and offered him special paid leave instead. On 15 October 1987 he lodged an internal appeal with the Director-General against the reckoning of the amount of compensation. On 28 October the Organization informed the complainant that in accordance with the Staff Rules and Regulations it would refer the matter to the Joint Advisory Appeals Board. On 7 March 1988 the Board recommended allowing the appeal. On 22 March the Director-General told the complainant that he agreed, but on 11 March he had lodged this complaint in pursuance of his claim.

B. The complainant contends that his complaint is receivable under Article VII(3) of the Statute of the Tribunal, which says that a staff member may lodge a complaint where the Administration fails to take a decision within 60 days from the notification of the claim, and he has 90 days in which to do so. In this case the time limit expired on 13 March 1988.

He claims payment of compensation reckoned at twelve months' final salary plus CERN's contributions to the Pension Fund at the rate of 15 per cent of salary. He also seeks an award of costs.

C. The Organization replies that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress as Article VII(1) of the Statute of the Tribunal required him to do. He was kept officially informed of the appeal proceedings: for example, he was told that the Appeals Board was to meet and was sent the Organization's reply. He may not therefore rely on Article VII(3), which presupposes that no decision whatever has been taken. Furthermore, the decision of 22 March 1988 gave him full satisfaction, as indeed he acknowledged in a letter of 26 May 1988, and his complaint is therefore devoid of substance.

His claim to costs is unfounded: because he acted hurriedly it was his own fault that he incurred legal expenses. Besides, the claim did not form part of his internal appeal.

D. In his rejoinder the complainant maintains that his complaint is receivable. He observes that his purpose in filing it was to safeguard his rights and escape the time-bar in Article VII(3) of the Statute. He says that he never got any

"decision" as defined in the case law, viz. one taken by an agent of the Organization which has legal effect. He was not kept informed of the Appeals Board proceedings. He did not file his complaint until the last day but one before the time limit expired. As to the merits, he agrees that he has obtained satisfaction and accordingly withdraws all his claims save the one to costs.

E. The Organization reaffirms in its surrejoinder that the complainant was quite aware of the proceedings before the Appeals Board and in accordance with Article VII(1) of the Statute ought to have awaited the final decision before going to the Tribunal. Since his claim to costs cannot stand independently of the other claims it is, like the complaint as a whole, irreceivable.

CONSIDERATIONS:

1. This complaint, which is dated 10 March 1988, was filed on 11 March. The Director-General of CERN decided on the strength of a report by the Joint Advisory Appeals Board to allow the complainant's internal appeal and so informed him by a letter dated 22 March. The decision was later put into effect. The Tribunal therefore need not rule on the main heads of claim, which have been met.

2. It will nevertheless entertain the complainant's subsidiary claim to costs. He maintains that he is entitled to an award against the Organization because he was granted satisfaction *pendente lite* and because his complaint was receivable at the date of filing.

The Organization demurs on the grounds that he filed before the internal proceedings were at an end and his complaint is therefore irreceivable.

3. The Organization is thus relying on Article VII(1) of the Statute of the Tribunal, which says that a complaint shall not be receivable unless the complainant has exhausted the internal means of redress available under the applicable Staff Regulations.

For his part the complainant is relying on VII(3), which reads: "Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision".

4. This is yet another case in which VII(1) and (3) have to be read together. As the Tribunal has said before, when there is an internal appeals body there will be no "decision" within the meaning of VII(3) unless the Organization has at least informed the complainant that his claim is being forwarded to that body.

5. In this case the complainant submitted an internal appeal to the Director-General of CERN on 15 October 1987. Long before the time limit of sixty days ran out he received a letter dated 28 October telling him that before a decision was taken the Joint Advisory Appeals Board must be consulted "in accordance with Article R VI 1.06 of the Staff Regulations".

The internal appeal was accordingly referred to the advisory body provided for in the Staff Regulations and the letter of 28 October constitutes a "decision" within the meaning of VII(3).

The procedure laid down in Chapter VI of the Staff Regulations went ahead. In accordance with R VI 1.08 the Board heard the complainant on 10 February 1988. R VI 1.09 requires the Board to submit its recommendations to the Director-General within thirty calendar days after the date of the last hearing to which the complainant has been summoned, and according to R VI 1.10 the Director-General shall notify his decision within 60 calendar days after receipt of the Board's recommendations. On 7 March 1988, less than a month after it had heard the complainant, the Board reported, and the Director-General took his decision on 22 March.

So the complainant may not properly contend that the time limits had expired by 11 March 1988 and he is mistaken in relying on silence on the Administration's part since the time limits were complied with. He cites no fact that might have led him to imagine that the Board and the Administration would not be answering his appeal. His complaint being premature and therefore irreceivable, his claim to costs fails.

6. In any event in the matter of costs the Tribunal has absolute authority that no text can fetter. It is plain from the case law that its ruling on costs will depend on the circumstances of the case. Even if it had held this complaint

receivable and well founded it would not necessarily have made any award.

DECISION:

For the above reasons,

1. The Tribunal need not rule on the main heads of claim.
2. It allows CERN's objection to the receivability of the claim to costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gros Espiell
A.B. Gardner