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

SEVENTY-THIRD SESSION

In re LANGELEZ (No. 2)

Judgment 1172

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 17 April 1991 and corrected on 27 June, the Organization's reply of 9 October 1991, the complainant's rejoinder of 21 February 1992 and the Organization's surrejoinder of 24 April 1992;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Rules VI 1.01 and VI 1.03 and Regulation R VI 1.05 of the CERN Staff Rules and Regulations;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. Judgment 1104 sets out under A some of the material facts of this case and sums up the complainant's career. In that judgment the Tribunal dismissed his first complaint, which challenged the terms of reference which CERN had given a medical expert and which called for assessment of the complainant's fitness for shift work. The Tribunal further held that he might file another complaint about the dispute as a whole once the expert had reported and an administrative decision had been taken.

In October 1990 the expert the parties had agreed to appoint found that the complainant was unfit for shift work and that his ailments were not service-incurred. CERN gave him new duties as a mechanic at grade 6. Reporting to the Director-General in a letter of 7 January 1991, the Joint Advisory Rehabilitation and Disability Board, to which his case had been referred, recommended regarding his new assignment as satisfactory and his ailments as not service-incurred.

By a letter of 15 January 1991, the decision he is impugning, the Head of Administration informed him on the Director-General's behalf of the endorsement of the Board's recommendations.

In a letter dated "13 January" (recte 13 March) 1991 he asked the Director-General to let him show his fitness for shift work by assigning him to such work on trial and stated reservations about not treating his ailments as service-incurred.

A reply of 21 March on the Director-General's behalf pointed out that the letter of 15 January had endorsed recommendations from the Joint Advisory Rehabilitation and Disability Board, not from the Joint Advisory Appeals Board. They were about his rehabilitation and the origin of his ailments, not his unfitness for shift work; the medical expert having found him unfit, there was no question of granting him permission to do any sort of shift work.

B. The complainant gives a full account of his dispute with the Organization as to whether the shift system followed since 1984 is in line with the Staff Regulations. He blames his ailments on having had to do shift work that was against the rules.

C. In its reply CERN submits that the complaint is irreceivable because the complainant failed to lodge an internal appeal under Rule VI I.03 of the Staff Rules. Under Article VII(1) of the Tribunal's Statute a complaint is not receivable unless the impugned decision is a final one and the person concerned has exhausted all the means of resisting it under the applicable regulations. The complainant's letter to the Director-General of 13 March 1991 does not say that he is appealing against the decision of 15 January 1991. Since the Organization had no reason to treat his letter as an appeal the Director-General did not set the appeal procedure in motion. The reply of 21 March

1991 reminded him that the decision that he was unfit for shift work had been taken on 3 October 1988 and upheld on appeal on 10 August 1989 and said that there was no new fact warranting review. On getting that reply he might again have gone to the Joint Advisory Appeals Board, but he did not.

CERN argues subsidiarily that the impugned decision does not infringe the Staff Rules. It rests on objective appraisal of the state of his health.

D. In his rejoinder the complainant seeks to refute the Organization's objections to receivability on the grounds that his letter of 13 March 1991 challenged the decision of 15 January 1991 and asked the Director-General to entertain his claims. He believes that his complaint is not time-barred since he got notice of his reassignment to the post of mechanic in CERN's letter of 15 January 1991 and appealed against it in his letter of 13 March.

E. In its surrejoinder CERN takes up the complainant's pleas and presses its objections to receivability and arguments on the merits.

CONSIDERATIONS:

1. The complainant is at odds with CERN over the sort of work that the state of his health allows him to perform.

Judgment 1104 of 3 July 1991 dismissed his first complaint, which was about procedural issues relating to referral to a medical expert agreed on by both sides. But it said that the complainant might file another complaint once the expert had reported and the administrative decision had been taken.

2. The expert reported in October 1990 and the Joint Advisory Rehabilitation and Disability Board on 7 January 1991. By a letter of 15 January the Head of Administration told the complainant of his decision, in line with the Committee's recommendation, to put him on a grade 6 post for a mechanic and not to treat his ailments as service-incurred. He had notice of that decision on 18 January.

3. He filed this complaint challenging it on 17 April 1991, within the time limit of ninety days in Article VII(2) of the Tribunal's Statute and to that extent his complaint is receivable.

But Article VII(1) sets another condition of receivability: the decision impugned must be a final one and a complainant must have exhausted such means of redress as are open to him under the staff regulations. In CERN's submission the complainant has not met that condition.

4. Rule VI 1.01 of the CERN Staff Rules says that "Every member of the personnel shall have the right to appeal against any decision of the Director-General concerning himself", and Rule VI 1.03 that the appeal shall be made to the Director-General, who, "before taking any decision on its substance", shall consult a joint board made up as the Staff Regulations prescribe, namely the Joint Advisory Appeals Board.

The impugned decision of 15 January 1991 was taken on the recommendation, not of the Appeals Board, but of the Joint Advisory Rehabilitation and Disability Board.

Though that in itself does not mean that the complainant never filed an internal appeal - since he would not be liable for any mistake of CERN's own making - there is another difficulty over receivability.

5. In its original decision of 3 October 1988, which Judgment 1104 refers to under A, CERN declared the complainant to be "handicapped with respect to his post as far as it concerns shift work" and he filed an internal appeal against that decision on 22 November 1988. In its report of 19 July 1989 the Appeals Board recommended rejecting that appeal and CERN did so by its decision of 10 August 1989.

But those appeal proceedings are irrelevant to this complaint since the parties later agreed to refer their dispute to a medical expert. So it was such referral, and not an internal appeal, that prompted the reopening of the case so that the competent authority might take a decision on the strength of the findings. It was on that understanding that Judgment 1104 said that the complainant reserved his right of appeal in full.

That the impugned decision of 15 January 1991 was not the outcome of any internal appeal procedure is indeed borne out by the complainant's own attitude: before coming to the Tribunal he pursued discussion with the Organization.

6. On 13 March 1991 the complainant wrote the Director-General a letter within the time limit of sixty days set in Regulation R VI l.05 for filing an internal appeal. The Organization replied on 21 March and he appends the text of its letter to this complaint, though he is not formally impugning it. He makes out that his letter of 13 March was his internal appeal under Chapter VI of the Staff Rules.

The Organization answers that, though the correspondence discussed the state of his health, his letter of 13 March was not so worded as to amount to such appeal. In view of the language he used it had, it says, no cause to treat his letter of 13 March 1991 as an internal appeal. It was on that understanding that it answered him on 21 March by a letter which was plainly not to be treated as a reply to an internal appeal. Yet the complainant has not applied for referral to the Appeals Board but has gone straight to the Tribunal.

7. The complainant's letter of 13 March dwells at length on the history of the case from 1983, when CERN brought in the new rota system with seven shifts in each work cycle, and says he wants to be allowed to follow a four- or five-shift work cycle. As to the cause of his ailments he merely expresses reservations about the decision of 15 January 1991. Although his letter uses the term "appeal" and cites Chapter VI, Section 1, of the Staff Rules, which is headed "Disputes and Appeals", he does no more than ask the Administration to "follow a clear, fair and thorough procedure that will take account of all material facts and lead to a reasonable and honorable outcome for both sides".

The conclusion is that in substance his letter of 13 March amounted to a request for further information and explanation on a matter the parties had been discussing for years. If his intention was to lodge an appeal under Chapter VI of the Staff Rules he ought to have used language more in keeping with that of an appeal. In any event, on receiving CERN's reply of 21 March to his letter he ought to have applied for referral to the Appeals Board, which, after all, is not just a formality. Had he applied for such referral the ambiguous wording of his letter might have been treated as just an oversight, and had the Organization turned down his claims it might have been held that he had exhausted the internal means of redress as Article VII(1) of the Tribunal's Statute required him to do.

His complaint fails because it is irreceivable.

8. Lastly, the complainant argues that the impugned decision was ultra vires and, that being so, there is no time bar.

He is mistaken. Lack of authority may be a reason for quashing a decision, but is not a reason for treating it as null and void. Provided that a text purports to be a decision, whoever may have taken it, it is challengeable in accordance with the set procedure.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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