

SEVENTY-FIFTH SESSION

***In re* MILAN**

Judgment 1274

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Richard Milan against the European Organization for Nuclear Research (CERN) on 17 July 1992, CERN's reply of 13 October, the complainant's rejoinder of 18 November 1992 and the Organization's surrejoinder of 22 January 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations R III 1.18, R III 1.23 and R III 1.25 of the CERN Staff Regulations and CERN Administrative Circular No. 22 of January 1985 on the award of additional periods of membership in the Pension Fund to shift workers;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Frenchman who was born in 1937, joined CERN on 1 April 1959 as a fireman and on 23 July 1962 was given an appointment as an electronic calculator operator. Since 1 April 1961 he has held an indefinite appointment. He was promoted in turn from grade 4 to grade 7 and received three bonuses for outstanding service. From 1959 to 1974 he did shift work.

On 1 April 1980 CERN introduced a new Regulation, R III 1.25, to provide that shift work conferred a right to additional periods of membership of the Pension Fund. Regulation R III 1.18 defines shift work.

The coverage of Regulation R III 1.25 is set out in Administrative Circular No. 22, which CERN issued in January 1985. The Regulation was to apply to staff members: (1) who were recruited before 1 July 1983; (2) who did shift work within the meaning of Regulation R III 1.18 for a total of 10 years, consecutive or not; and (3) who stopped shift work after 31 March 1980. Anyone who met all three conditions was to get a letter saying when he might take early retirement.

The complainant received a questionnaire which the Administration sent to all staff members recruited before 1 July 1983 who had done shift work. He filled it up and returned it on 27 February 1985 but got no reply.

On 13 May 1991 he wrote to the Leader of the Personnel Division to ask whether he might be granted additional periods of membership of the Pension Fund, having done shift work for over 10 years. The Leader of the Division answered in a letter of 21 May that his application was out of time and unsound anyway: only someone who had stopped shift work after 31 March 1980 qualified for the additional periods, and he had been taken off it in 1974. By a letter of 11 June 1991 to the Director-General he lodged an internal appeal.

In its report of 3 April 1992 the Joint Advisory Appeals Board advised the Director-General to refuse the complainant an additional period of membership of the Pension Fund but to review circular 22, on the grounds that it seemed illogical to count shift work before 31 March 1980 only for those who continued shift work after that date but not for others. By a letter of 21 April 1992, the impugned decision, the Director of Administration informed the complainant on the Director-General's behalf that his appeal had been refused.

B. The complainant puts forward three pleas.

(1) He says that he did shift work from 1974 to 1982. A memorandum of 25 May 1972 issued by one of the chiefs of the CERN's computer centre stipulated that the centre had to operate round the clock and every day of the week, and a further memorandum, sent to him on 25 March 1974, said that supervisors of "remote input-output stations" would be regarded as "full members of the computer centre team". The complainant's work schedule was from 8

a.m. to 5.45 p.m. on weekdays and from 8 a.m. to 12 noon one Saturday and one Sunday in every four.

He informed the Leader of the Personnel Division by a letter of 11 December 1991 that between 1974 and 1982 he had done shift work, as could be seen from slips for the additional payments he had been granted for shift work in accordance with Regulation R III 1.23. He asked that 1982 be taken as his last year of shift work. In a letter of 20 December 1991 the Leader of the Personnel Division refused his claim and thereby made a mistake of fact over his performance of shift work.

(2) The complainant objects to the restrictive construction CERN is putting on Regulation R III 1.25 in circular 22. That Regulation, which came into effect on 1 April 1980, provides that shift work confers a right to additional periods of membership of the Pension Fund, but it states no date. Though it recognises the retroactive effect of the Regulation, circular 22 refuses to apply it to staff taken off shift work before 31 March 1980. The complainant fails to see why for someone who did over 10 years' shift work the period before that date cannot count in accordance with R III 1.25. A Regulation must prevail over subsidiary rules in a circular.

(3) To count shift work done before 31 March 1980 only for employees who continued doing it thereafter but refuse to do so for those who did not discriminates between staff in the same situation.

The complainant asks the Tribunal to set aside the Director-General's decision of 21 April 1992, order the Organization to grant him additional periods of membership in accordance with Regulation R III 1.25 for the shift work he did before 31 March 1980 and award him costs.

C. In its reply CERN observes that when it introduced the system of additional periods of membership of the Pension Fund it sent a questionnaire to all staff recruited before 1 July 1983 who had done shift work. The complainant filled it up, declaring that he had done shift work from 1959 to 1974, and sent it back on 27 February 1985. He thereby acknowledged that he had come off shift work before 31 March 1980, and he was well aware of that because in his letter of 13 May 1991 he asked CERN to grant him an additional period of membership "out of fairness".

CERN submits that what he was doing from the end of 1974 onwards may not be regarded as shift work within the meaning of R III 1.18 because it did not involve work that had to be performed regularly for at least 15 hours a day.

He fails to qualify for additional periods of membership because R III 1.25 and circular 22 do not cover anyone who came off shift work before 31 March 1980. Since circular 22 cannot apply to any period prior to the entry into force of R III 1.25, the construction it puts on the Regulation is not "restrictive".

It is the complainant who wants privileged treatment, not CERN that is discriminating against him by too strict an application of the rules. The Organization does not grant retroactive entitlement to additional periods of membership, and shift work done before R III 1.25 came in counts only for the purpose of applying the system, not for the purpose of conferring rights. Consistent precedent has it that new rules that bestow financial benefits are valid from the date of entry into force and without retroactive effect.

D. The complainant points out in his rejoinder that the rule against retroactivity is not a hard and fast one, as the Tribunal held in Judgment 1130 (in re Godin and others): "the retroactive decision will be admissible in law where the effect of it is favourable to the staff member it applies to".

Circular 22 applies to all staff recruited before 1 July 1983 who did shift work for at least 10 years and stopped it after 31 March 1980: the provisions were applied retroactively, because the periods of shift work prior to that date were taken into account. The Organization showed discrimination in applying them, and that is why the Joint Advisory Appeals Board in its report questioned the logic of refusing entitlement to additional periods of membership equivalent to years of work performed exclusively in shifts, "when all those years could have been taken into account had the shift work continued for a mere six months after 31 March 1980".

The complainant points out that the declared intent of the circular is to enable someone who has put up with the constraints of shift work to take early retirement and so - as the Organization wants - to reduce not just staff but also the risks of accident, which are greater when there are older employees who have been doing shift work.

E. In its surrejoinder the Organization presses its pleas. It granted additional periods of membership with

immediate not retroactive effect. Shift work prior to 1 April 1980 counts only for the purpose of reckoning the additional periods and confers no entitlement. Besides it is irrelevant here because the complainant does not qualify.

CERN denies discriminating against the complainant: Regulation R III 1.25 and circular 22 apply to all staff who meet the conditions set.

It is not for the complainant to say what the Organization's operational requirements are and how they should be reflected in the Staff Rules and Regulations: those are matters for CERN authorities to decide and they do not fall within the Tribunal's competence.

CONSIDERATIONS:

1. CERN recruited the complainant as a fireman in 1959 and he has had a long career with the Organization. In 1962 he was assigned to the electronic computer service as an operator. In 1966 he became a chief operator, in 1971 a team leader and in 1973 an assistant supervisor. In 1974 he was transferred to a post as supervisor of what are known as "remote input-output stations" (RIOS) and he held it until 1982, when they were done away with. Though he has been with CERN ever since, his recent career need not be recapitulated here, being immaterial to this dispute.

2. The matter at issue is the complainant's claim to benefit under provisions of the Staff Regulations whereby shift work confers a right, under certain conditions, to additional periods of membership of the Organization's Pension Fund. He put the claim in a letter of 13 May 1991 to the Leader of the Personnel Division. The Leader replied in a letter of 21 May that his claim was out of time and in any event devoid of merit since it did not meet the conditions set in the relevant administrative circular. The complainant filed an internal appeal with the Director-General on 11 June. The Joint Advisory Appeals Board first met on 23 October 1991 and ordered further submissions so that the Administration might answer the complainant's allegations about his conditions of employment from 1974 to 1982.

The Board met again on 20 February 1992. After studying the further submissions it recommended that the Director-General uphold his decision to refuse the complainant's claim, although it was in favour of revising the circular applied to the case.

The complainant is challenging the Director-General's decision upholding the refusal of 21 May 1991.

3. Before the Board the defendant argued that the appeal was out of time because in a form he had filled up in 1985 he had declared that he had done shift work only up to 1974. But the Organization does not press the point, which was irrelevant anyway, and the Tribunal will therefore take up the complainant's pleas, of which there are three.

The first is that the impugned decision shows a mistake of fact in that, contrary to what the Organization maintains, he did do shift work from 1974 to 1982.

Secondly, he argues that the administrative circular restricts the ambit of Regulation R III 1.25 by confining the additional pension benefits to staff who stopped doing shift work after 31 March 1980.

Thirdly, he contends that CERN practice is inconsistent and unlawfully discriminates between staff who have had the same conditions of employment in the course of their career.

4. The Tribunal's ruling on those pleas turns on the material texts, and they are the following.

A new version of R III 1.25 that came into force on 1 April 1980 reads:

"Shift work confers a right, under conditions specified by the Director-General, to additional periods of membership in the Pension Fund".

Regulation R III 1.18 reads:

"Shift work shall be any work which, over a period of at least 26 consecutive weeks (including leave and stoppages), is performed regularly for at least 15 hours per day and necessitates at least two persons per work station."

By administrative circular 22 of January 1985 the Director-General set out the conditions for applying R III 1.25 and declared them to cover -

"all members of the personnel who are members of the Pension Fund

- who were recruited before 1st July 1983,

AND who performed shift work within the meaning of Article R III 1.18 of the Staff Regulations for a total period of at least 10 years, which need not have been consecutive;

AND who ceased performing shift work after 31 March 1980."

Thus the circular withholds the benefit of the Regulation from anyone who stopped doing shift work before 31 March 1980.

5. First, was the complainant doing shift work after 31 March 1980? He says that his work with the RIOS from 1974 to 1982 kept him on the shift work he had been doing earlier.

But the complainant offers no specific evidence in support, and indeed he himself declared in the form he had filled up in 1985 about the period in which he had been doing shift work that might have qualified him for the benefit, that he had been doing such work only from 23 July 1962 to 23 October 1974. The only item to suggest he may have done shift work after 1974 is an "Application for payment of overtime and other hours" which he appends to his complaint and which shows that a few hours which he worked after 5.30 p.m. and was paid for came under the heading "Shift work". But the work he was doing from 1974 to 1982 was plainly not of a kind which "over a period of at least 26 consecutive weeks ... is performed regularly for at least 15 hours per day and necessitates at least two persons per work station". So he may not properly contend that in that period he was doing shift work within the meaning of the material rule.

6. Secondly, did circular 22 unlawfully restrict the scope of R III 1.25 by confining the benefits to staff who were taken off shift work after 31 March 1980? The complainant submits that the Director-General was not empowered to withdraw by circular a benefit that staff were entitled to under the Staff Regulations.

His plea fails. As was said above, R III 1.25, the provision about the right to benefits, came into force on 1 April 1980. It did not actually say that staff who by that date had come off shift work stood to benefit. There being no express provision for the retroactive application of the benefit introduced in 1980 to staff who had by then qualified for it under R III 1.25, the complainant is wrong to argue that the circular restricted the scope of the provision that the Director-General had to set conditions for applying. Entitlement to the benefit did not accrue until 1 April 1980 and staff who had not qualified for it by that date were properly denied it. Although, as the complainant says, the rule is retroactive in that periods of shift work prior to 1980 may count, that holds only for the method of reckoning the benefit, not the conditions for obtaining it.

7. The complainant's third plea is breach of equal treatment. In his submission there was no sound reason why staff who had been subject to similar conditions of employment should be treated differently according to the date at which they ceased to be so.

The whole system does make for inconsistency, as the Joint Advisory Appeals Board pointed out, but there has been no breach of equal treatment. At the time when the complainant was on shift work he had no right to the benefit that was introduced in 1980. So he was not in the same position in fact and in law as those who did qualify for the new benefit at that time.

8. Since none of his pleas is sound his complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo,

Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner

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