

EIGHTY-FIRST SESSION

***In re* BAILLON**

Judgment 1502

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul Baillon against the European Organization for Nuclear Research (CERN) on 23 August 1995, CERN's reply of 27 October, the complainant's rejoinder of 27 November and the Organization's surrejoinder of 15 December 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. Regulation R VIII 1.01 of the CERN Staff Regulations states:

"Claims for payment shall not be admissible after two years, except in the case of education grants, for which the period shall be one year, and other allowances, grants, indemnities or reimbursements, for which the period shall be six months.

These periods shall run from the date on which the payment becomes due."

The complainant, who is a Frenchman, has been an employee of CERN since 1966. Under Regulation R IV 1.19 of the Staff Regulations he is entitled to an education grant for each of his three children.

By a memorandum of 31 August 1994 he submitted to the Personnel Division of CERN a claim to repayment of school expenses incurred from February to the end of August 1993. He said he was sorry for his "quite unintentional lateness": he had not known about the time limit of one year and had thought that he had to group claims as far as possible. By a memorandum of 19 September 1994 the Division answered that apart from a bill of August 1993 his claims were time-barred under R VIII 1.01; the time limit might be waived if the delay was due to reasons "beyond the control of the staff member"; and if there were any such reasons he should provide evidence of them. In an undated handwritten note he listed the dates at which he had been absent from CERN and so unable to fill up or hand in claim forms. The Division replied in a memorandum of 29 September 1994 that absence did not amount to force majeure within the meaning of paragraph IV.9 of Administrative Circular No. 7 on time limits.

By a memorandum of 23 September 1994 he had lodged an appeal with the Joint Advisory Appeals Board. In its report of 27 March 1995 the Board recommended meeting all his claims. It pointed out that "R VIII 1.01 ... in conjunction with the text of the claim form ... which allows claims to be grouped per term or per year, could mislead staff members". It was understandable, the Board said, that the complainant should think that the time limit ran from the end of a one-year period following his last claim; and "since the existing rules are not precise, time limits should be applied with flexibility so that staff members who exceed them slightly are not penalised disproportionately".

By a letter of 2 June 1995, the impugned decision, the Director of Administration rejected the appeal on the Director-General's behalf.

B. The complainant contends that he made his claims to school expenses in time and in accordance with R VIII 1.01. In his submission CERN requires staff to group such claims and so should waive the time limit, as point IV.9 of circular 7 allows. According to R A 9.08 only three claims to repayment may be made in any one year for each child, and further to a decision published in the CERN bulletin of 8 September 1986 claims must be either grouped so as to total at least 500 Swiss francs or submitted at the end of the school year if they come to a lesser amount.

The claim form, which cites those rules, contains the headings "one claim per child" and "per term or per year". The complainant chose to make his claims once in the year and submits that the time limit should therefore have been held over to one year from the date of his last claim.

He asks the Tribunal to set aside the impugned decision and award him costs.

C. CERN replies that the complainant is being inconsistent: he now argues that his claim was not late; yet in his memorandum of 31 August 1994 he admitted to "quite unintentional lateness" and promised to act "in time" in future.

It is odd that, as he professed in the memorandum accompanying his claim, he should have been unaware of the one-year time limit: the Staff Rules and Regulations, circular 7 and the claim form all mention it.

The requirement that staff members should group claims is not force majeure. There was nothing to prevent the complainant from filing his claims to the repayment of expenses paid from March to July 1993 either at the end of the school year or at the end of the calendar year or at any other time within one year from the dates at which he had paid the bills. Besides, none of the bills he submitted comes to less than 500 Swiss francs.

Another inconsistency is that his memorandum of 31 August 1994 said that his claim was "for the period from February 93 to August 1993" whereas he now says that "the one-year period in question ... was ... from 1.2.93 to 31.1.94 for the school expenses" of his three children.

D. The complainant denies giving force majeure as the reason for his delay in filing. It was CERN that raised the issue, and he merely responded.

The one-year time limit in R VIII 1.01 applies to "claims for payment", and he gathers that it runs from the date at which all items are available for processing of the claim by CERN. The Organization should have amended R VIII 1.01 to make it clear that the year starts at the date at which a bill is paid. Since the application of the requirement that claims be grouped the one-year time limit has put the staff member in a "legal trap".

His claims did cover the period from February 1993 to the end of January 1994, even though the expenses were all incurred from February to August 1993. Why has CERN paid only the bill of August 1993? It should have processed all the bills as one.

E. In its surrejoinder CERN presses its pleas. It maintains that the rule about the grouping of school bills does not affect the application of R VIII 1.01.

CONSIDERATIONS:

The material facts

1. The complainant, who was born on 17 September 1938, has been employed by CERN as a physicist since 14 February 1966. He has three dependent children: Dominique, who is at the Federal Polytechnic College at Lausanne, in Switzerland; Alice, who attends the international secondary school at Ferney-Voltaire, in France; and François, a student at a national institute of applied sciences in Lyons. The Staff Rules entitle him to repayment of part of their school expenses. He says that for some ten years he filed claims in time and CERN met them.

2. Staff Regulation R IV 1.19 says:

"A member of the personnel shall receive an education grant in respect of each dependent child attending an educational establishment full time."

The grant is as set out in Annex R A 9 to the Staff Rules and Regulations and Administrative Circular No. 12 on education grants. Annex R A 9.08 says that staff must group bills so as not to make more than three claims for each child in one year; Annex 2 to administrative procedure 2.15.2 requires "one claim per child (per term or per year)".

Regulation R VIII 1.01 sets time limits:

"Claims for payment shall not be admissible after two years, except in the case of education grants, for which the

period shall be one year, and other allowances, grants, indemnities or reimbursement, for which the period shall be six months.

These periods shall run from the date on which the payment becomes due."

Circular 7, also on time limits, says that claims to the payment of education expenses must be made within one year, but it does not explain when the year begins.

The claimant fills up a form which says that no more than three claims may be made for each school year and for each child and are to be submitted preferably during the school year and within one year.

3. On 31 August 1994 the complainant sent the Personnel Division a memorandum claiming repayment of the following grouped expenses:

for Dominique Baillon, second half

(ended 19 June 1993) 5,065.50 Swiss francs

for Alice Baillon, second half

(up to 30 June 1993) 1,105.50 French francs

for François Baillon, third term

(up to 30 June 1993) 3,289.50 French francs

By a memorandum of 19 September 1994 the Division refused his claims as out of time, the requirement that claims be grouped making no difference to the time limit in the Regulations. Only one item went through, for Dominique Baillon: "the rent for August 1993 may be repaid", said the memorandum, "because you suspended the time limit in August 1994 by your memorandum of 31 August". On the evidence the rent for August 1993 was payable in advance, by 1 August 1993, and the complainant paid it on 20 July 1993.

The complainant appealed. The Joint Advisory Appeals Board recommended meeting his claims in full and altering the rules on the processing of claims to make them clearer.

On 2 June 1995 the Director of Administration nonetheless rejected the appeal on the Director-General's behalf: he had no doubt but that the year ran from the date at which a staff member paid a bill, and the Organization's interest required strict observance of the time limit.

4. The parties maintain their pleas before the Tribunal.

The gist of CERN's case is that the time limit runs from the date of payment of the bill and is not altered by the requirement that claims must be grouped. The complainant's argument is that since claims may not be separate the time limit starts when a group of them may be submitted according to one of the options the rules allow; or at least - he adds - that is how the rules may be honestly construed, and only in breach of good faith may CERN impose any other construction.

The merits

5. In his original claim the complainant admitted that, to go by what he had been told, he was out of time, but he sought indulgence on the grounds of his ignorance of the rule.

That admission does not estop him from pleading later, after looking into the matter, that his claim was not late after all. The plea is not in breach of good faith.

Though not himself misled by the wording of the rules, which he had been unaware of, he may still argue that the text can bear a construction different from CERN's and one that should prevail for being more favourable to the staff.

6. How then is the time limit to be construed?

(a) As CERN said in the impugned decision, its own interests and sound management demand strict compliance with time limits, and non-compliance means forfeiting a right or the exercise thereof: for observance of time limits, see Judgment 1446 (in re Saunders No. 13) under 3, the further judgments cited therein and Judgment 1485 (in re Wassef No. 7).

As CERN argues, a time limit is not to be waived just because claims are seldom late or because the consequences of refusing waiver would be too harsh.

(b) Yet time limits must be construed in good faith. If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour: see Judgment 1376 (in re Mussnig) under 13 and the judgment cited therein.

7. What was the dies a quo for reckoning the time limit the Organization set for claims by the complainant to his children's school expenses?

The texts afford no explicit answer. R VIII 1.01 says that the time limit "shall run from the date on which the payment becomes due". That is a general formula that applies to any right to be exercised within a time limit, including the present complainant's claims. It does not denote the due date for payment of the school expenses a staff member wants to recover.

Two questions therefore arise. Is the dies a quo the actual date of payment of the bill or does it depend on the school term to which the bill relates? And secondly, does the requirement that claims be grouped make any difference to the time limit?

8. On the first question, about the dies a quo, CERN's thinking seems to have wavered. Before the Tribunal the Organization consistently holds to the date of payment; but the Personnel Division's letter of 19 September 1994 rejecting the complainant's claims seems to find the school term relevant. Thus, as to Dominique Baillon's rent for August 1993 it referred to the school term, not to the actual date of the advance payment, which was earlier. Circular 7 is no more helpful about claims to repayment of school expenses. For the other sorts of claim to repayment which it cites as examples, the dies a quo is not the date of payment: for expenses of travel on official business it is the date of return from travel, and for the costs of removal it is the date of the removal. CERN's interpretation, though it offers the tidiness of logic, may be neither suited to the particular case of repayment of school expenses nor in line with what circular 7 actually says about claims to other sorts of expenses. At all events claimants have ample room for doubt on the matter. In this case it is not in dispute that the complainant claimed within the one-year time limit the final payment for Dominique Baillon. So there is no reason to reject what the Organization has thereby allowed.

9. Opinion is split on the second question, about the effect, if any, of grouping claims. The Organization submits that the time limit for making a claim starts at the date of payment of each item of expenditure and that its requirement about the grouping of claims - which merely serves administrative convenience - makes not a whit of difference. The complainant retorts that repayment does not fall due under R VIII 1.01 as long as the rules bar the making of the claim, and that the requirement of grouping holds over the date at which repayment may be claimed.

The time limit must start at the date at which payment becomes due. If that were not so, the lapse of time would work to the claimant's detriment for as long as the rules precluded his making the claim. To make the would-be claimant wait, for any reason, before making the claim bars repayment. So the staff have grounds for supposing that they are not free to make claims until they can group. The complainant offers what is at least a tenable construction and for want of any more explicit guidance on the meaning of the time limit the staff may properly act on that construction. For CERN to impose a narrower one would be an abuse of authority.

That ruling, which the vague drafting of the present texts requires, does not harm any essential interests of the Organization, which may now issue straightforward and unambiguous provisions.

10. Contrary to what the complainant suggests, all that CERN requires is the grouping of claims for each child, not of claims for all the staff member's children, save where the total falls short of 500 Swiss francs. And in this case the total was above that figure.

Even if the construction to be put on the time limit is the one more favourable to the complainant was he in time in making the grouped claims for each of his children?

All the expenses for Alice and François Baillon were paid over a year before 31 August 1994, the date at which he made the claims to repayment: the material dates were 18 February and 25 May 1993 for Alice and 18 April 1993 for François. And they related, too, to a school half that ended at 30 June 1993, again over a year before the date of his claims. There was nothing to prevent his acting in time, and the claims for those two children are therefore barred.

11. As to Dominique Baillon, the letter of 19 September 1994 was right to say that the complainant's claim of 31 August to repayment of the latest expenses - the rent for August 1993 - was in time. But applying the construction more favourable to him means that at that date he was still in time to claim also the expenses incurred earlier because he was free to group them with the same claim. He says, and CERN does not deny, that he chose to group claims by year and not by school term. So those claims too must succeed.

12. Having won his case in part, he is entitled to costs.

DECISION:

For the above reasons,

1. The claims to repayment of the expenses incurred for Alice and François Baillon are dismissed.
2. The impugned decision is set aside insofar as it rejects the claim to the expenses incurred for Dominique Baillon.
3. The Organization shall pay the complainant 1,000 Swiss francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot
Mella Carroll
Egli
A.B. Gardner