

## EIGHTY-FIRST SESSION

### Judgment 1537

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. P. G. W. against the European Organization for Nuclear Research (CERN) on 14 July 1994, CERN's reply of 19 October, the complainant's rejoinder of 31 October 1995 and the Organization's surrejoinder of 31 January 1996;

Considering Articles II, paragraph 5, and VII 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. At the material time Article R II 6.02 of CERN's Staff Regulations said:

"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."

The complainant, a German born in 1952, joined CERN on 1 April 1989 under a three-year fixed-term appointment as a physicist at grade 9. His duties consisted mainly of work on an experiment known as OPAL. In an electronic ("E-mail") message of 19 March 1990 headed "Second probation for [P. G. W.]" the leader of his group advised the leader of the division to which the group belonged to release him from OPAL on the grounds that he had produced no tangible results.

From 1 June 1990 CERN assigned him to another experiment, known as DELPHI. By an E-mail message of 8 August 1991 his supervisor told the division leader that his participation had "reached a reasonable level".

By a letter dated 30 September 1991 the Leader of the Personnel Division gave him a six-month extension of contract until 30 September 1992 and said his letter should serve as the notice of non-renewal required under Article R II 6.02 of the Staff Regulations.

In a letter of 23 September 1992 the deputy Leader of the Experimental Physics Division (PPE) said that the Administration was willing to hold over the date of termination by three months and that, provided the complainant supplied "written evidence of alternative employment" and his performance was satisfactory from October to December 1992, the Administration would consider a "further and final" extension until 30 April 1993.

The complainant having informed the Administration that he would have a job in the United States from May to July 1993, the Leader of the Personnel Division announced in a letter to him of 22 December 1992 that he would have his contract extended until 30 April 1993, saying it was the last CERN could offer him.

By a letter of 30 June 1993 he asked the Director-General for "a new term contract" from 1 May 1993 to 31 August 1994. On 7 July 1993 CERN gave him a contract for 16 months as from 1 May 1993 as a physicist at grade 10. Although he took up the position, he failed to sign the contract, which stipulated that the "post is established for a limited duration ... and will not be renewed or extended". The contract also said that it "assumed" that he had exhausted any annual leave entitlement accrued as at 30 June 1993.

In a letter of 21 December 1993 the Director of Administration gave him under Article R II 6.02 notice on the Director-General's behalf of the expiry of his appointment at 31 August 1994.

In a letter of 30 January 1994 to the Director he challenged that decision and the terms of the contract dated 7 July 1993, the text of which he said CERN had not sent to him until 7 December.

By a letter of 6 April 1994 he told the Director he wanted the Director-General to review his case. In a reply dated 14 April 1994, which he impugns, the Director-General said there were no grounds for reviewing the terms of his

contract and that the date of expiry, 31 August 1994, held good.

B. The complainant submits that since he never waived the rights he enjoyed under his original contract neither the termination nor the loss of his entitlement to leave was lawful. The basis for the decision to terminate was a so-called "second probation report", which the Administration secretly put in his personal file and which contained unsubstantiated charges he got no opportunity to refute.

He asks the Tribunal to clarify his status, order the removal of offensive documents from his file, safeguard his entitlement to annual leave and award him damages.

C. In its reply CERN contends that his complaint is irreceivable on several grounds. The letter he is challenging was not a "decision" within the meaning of Article VII of the Tribunal's Statute; appeal against the decision of 21 December 1993 was time-barred; and his claims were unclear. As for his claims to the removal of documents from his personal file and to leave entitlement, he has failed to exhaust his internal remedies.

In subsidiary argument on the merits the Organization observes that the complainant accepted the terms of the contract it offered him on 7 July 1993 and got due notice of non-renewal.

D. In his rejoinder the complainant seeks to refute CERN's arguments on receivability: not until 7 December 1993 did he get a copy of the contract dated 7 July 1993, and not until 10 January 1994 the decision of 21 December 1993. His challenge to both in the letter of 30 January 1994 was timely, as is his complaint to the Tribunal.

He enlarges on the merits, pointing out that CERN may not rely on Article R II 1.16 in support of its allegation that he tacitly accepted the change in his status since he had not seen the new terms until five months after CERN deemed them to apply.

E. In its surrejoinder the Organization answers the complainant's submissions on receivability and describes his pleas on the merits as "baseless".

#### CONSIDERATIONS:

1. CERN first employed the complainant under a contract, which he signed on 29 November 1988, for a period of three years from 1 April 1989. By a letter dated 30 September 1991 the Leader of the Personnel Division told him that his contract was extended by six months, to 30 September 1992, and would not be further renewed. But a letter of 23 September 1992 from the deputy Leader of the Experimental Physics Division (PPE), in which he was employed, informed him that at his request his appointment was extended to 31 December 1992 and that "a further and final shift" of the date of his departure until 30 April 1993 could be considered provided he produced "written evidence of alternative employment" and a satisfactory report on his performance from October to December 1992.

2. By a letter of 18 December 1992 he informed the deputy Leader of the PPE Division that he intended to accept an offer of a temporary position he would be taking up at a university in the United States in May 1993. By a letter dated 22 December 1992 the Leader of the Personnel Division told him that he would get one last extension of contract to 30 April 1993: "no further extension", the Leader warned, "will be possible". His fixed-term appointment accordingly expired at that date.

3. He nevertheless offered to work for CERN on a temporary project in what is known as the LEP Polarisation Group and by a letter of 30 June 1993 asked the Director-General to grant him "a new term contract" covering the duration of that project, from 1 May 1993 to 31 August 1994, and requiring "a new recruitment authorization by the Director-General". On 7 July 1993 the Organization issued a new contract for a period of 16 months as from 1 May 1993 and up to 31 August 1994. The contract stated: "The post is established for a limited duration ... and will not be renewed or extended". Although the complainant took up employment he did not sign the contract. He says he did not get a copy until 7 December 1993; the Organization maintains that it was "issued" in July 1993.

4. By a letter dated 21 December 1993 the Director of Administration informed him that his contract would "not be renewed or extended" and said he was thereby given the notice of non-renewal required by Article R II 6.02 of the Staff Regulations, which is six months.

5. Under Staff Rule VI 1.02 there is no right of internal appeal against a decision not to renew a contract, but under Rule VI 1.05 there is a right of appeal to the Tribunal. The complainant did not appeal to the Tribunal either

against the decision of 22 December 1992 mentioned in 2 above or against the decision of 21 December 1993 referred to in 4 above.

6. In a letter dated 30 January 1994 to the Director of Administration he said that he could not accept what the Director had said in his letter of 21 December 1993. In a letter of 6 April 1994 to the Director he raised the question of his contractual relationship with the Organization, argued that the contract he had signed with CERN on 29 November 1988 had never been terminated, and referred to a probation report which he said had been "illegally" entered in his personal file.

7. The Director-General replied on 14 April 1994 stating that there was no reason to reopen the question of the length of his contract, which was to end at 31 August 1994, and that he had given explicit delegation of authority to the Director of Administration and to the Leader of the Personnel Division to deal with matters concerning his relationship with the Organization.

8. That is the decision that the complainant identifies as the one he is impugning, and the relief he seeks from the Tribunal is that it -

- (1) "clarify" his "contractual status at CERN";
- (2) "order the removal of documents with unsubstantiated negative allegations from his personnel file";
- (3) "regulate the damage caused by CERN"; and
- (4) "protect" his "vacation leave claims."

In his rejoinder he explains that what he claims under (1) is a ruling as to whether his contract was lawfully terminated at 31 August 1994.

9. The Organization pleads that its decision of 14 April 1994 was mere confirmation of the one of 21 December 1993 and that because the complainant failed to file a complaint with the Tribunal within the time limit, set in Article VII(2) of its Statute, of ninety days from the date of notification of 21 December 1993 any objection to the decision not to extend his contract beyond 31 August 1994 is time-barred.

10. The plea succeeds. Confirmation of a decision does not set off a new time limit for action. So the decision that adversely affected the complainant and that he ought to have challenged was the one of 21 December 1993. Having failed to appeal against it to the Tribunal within the prescribed time limit of ninety days, he is barred from challenging the non-renewal in the present complaint.

11. He argues that he never agreed to the terms of the contract dated 7 July 1993, that he refused to sign it and that he continued to be employed under the contract he had signed on 29 November 1988.

12. Insofar as he is arguing that he continued to be employed under the contract he had signed on 29 November 1988 the claim is long since time-barred. Since he failed to appeal to the Tribunal within the ninety days against the decision of 22 December 1992 not to renew that contract any claim to its continuance is out of time.

13. Lastly, his claims to "the removal of documents" from his personal file and to "vacation leave" are irreceivable under Article VII(1) of the Tribunal's Statute because he failed to file any internal appeal and so to exhaust the means of redress available to him within the Organization.

14. Since his other claims fail the question of his entitlement to damages does not arise.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 9 July 2007.