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

106th Session **Judgment No. 2810**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. B. against the European Organization for Nuclear Research (CERN) on 6 February 2008, the Organization's reply of 21 May, the complainant's rejoinder of 30 July and CERN's surrejoinder of 30 September 2008;

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

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

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

A. The complainant, a French national born in 1973, was recruited by CERN on 1 October 1998 as a technical engineer (electronics) in the Experimental Physics Department on a three-year limited-duration contract. His status was that of a staff member and he was assigned to career path VI, grade 7. On 1 September 2001 he was assimilated into career path D. On 1 October 2001 his contract was renewed for three years until 30 September 2004. The contract amendment stated that no further renewal or extension would be granted.

In the summer of 2003 the complainant applied for a post of technical engineer (electronics), for which a fixed-term contract was

being offered. His application was examined by a selection board, then by the Long Term Contract Board (LTCB), but he was not awarded the contract in question. By a letter of 25 March 2004 the Human Resources Coordinator offered the complainant an exceptional extension of his limited-duration contract on the basis of Article R II 1.19 of the Staff Regulations. The complainant accepted the extension of his contract from 1 October 2004 until 30 September 2007, the date on which he left the Organization.

In the meantime, in 2006, two long-term jobs for technicians or technical engineers (electronics, electromechanics or electricity) became available within the Physics Department's manpower plan. The Human Resources Department informed the complainant in an e-mail of 25 July 2006 that he could be considered for one of these jobs. The description of the activity concerned was attached to this e-mail together with Administrative Circular No. 2 (Rev. 3), entitled "Recruitment, appointment and possible developments regarding the contractual position of staff members" and published in January 2006, which explained in detail the applicable criteria and new procedure. The complainant announced in an e-mail of 3 August that he wished to be assessed for the award of an indefinite contract. After the assessment in question, the Departmental Contract Review Board (DCRB) concluded that the complainant met all the criteria laid down in the above-mentioned circular, but it was critical of his initiative in some areas. The Director-General informed the complainant by a letter of 30 March 2007 that he had decided not to award him an indefinite contract.

The complainant appealed against this decision on 22 May 2007. In its report of 22 October the Joint Advisory Appeals Board recommended that the Director-General should dismiss the appeal, but that "in the near future" he should consider the complainant's candidature "for a long-term post". The Director-General informed the complainant by letter of 21 November 2007 that he had decided not to award him an indefinite contract or consider his candidature for a long-term job. That is the impugned decision.

B. Relying on both the Tribunal's case law and the texts in force in CERN, the complainant submits that a vacancy notice concerning an indefinite contract for a specific job, rather than the range of jobs covered by the term "technician or technical engineer (electronics, electromechanics or electricity)", ought to have been published and that the job description should have been adjusted accordingly. He infers from this that the selection process is tainted with a serious procedural flaw.

The complainant contends that the requirement of reciprocal trust was breached. He states that his treatment under the former contract system could be regarded as an implicit promise that he would obtain a long-term job within a few years of his interview by the LTCB, since only the personal criteria counted in that system. In addition, the decision not to award him an indefinite contract is tainted with an obvious lack of transparency. In this regard the complainant asserts that he did not know for what post and on what conditions he was competing. Moreover, he was given no information regarding the basis on which his application was compared with that of other candidates with different profiles, the procedure for ranking candidates or the number of persons selected.

According to the complainant, the impugned decision rests on a report which omits essential items of information and which contains manifestly erroneous conclusions. In view of his "excellent" appraisal reports, he is surprised that the Director-General endorsed the DCRB's opinion that he should not be ranked among the best candidates. He adds that the DCRB failed to take account of many of the technical aspects of his work and its diversity, or of his know-how. In his opinion his work was therefore not thoroughly assessed and the procedure resulting in his not being awarded an indefinite contract was not conducted with due care.

Lastly, the complainant submits that there is a major contradiction in the contract policy reflected in Administrative Circular No. 2 (Rev. 3), which results in a misuse of procedure. He argues in particular that the disputed decision conflicts not only with the terms of

the above-mentioned circular, but also with the principle that staff members must have equal chances of obtaining an indefinite contract.

The complainant asks the Tribunal to set aside the decision of 21 November 2007 and to order CERN to reconstitute his career as from the date of his termination and to award him an indefinite contract as from that date. Failing that, he asks the Tribunal to order CERN to pay him the equivalent of five years' salary and pensionable allowances. He also claims costs.

C. In its reply the Organization states that Administrative Circular No. 2 (Rev. 3) makes it clear that the obligation to publish a vacancy notice applies solely to the initial recruitment of staff members. It fails to understand how the non-publication of a vacancy notice could have injured the complainant, since he was actually assessed for the award of an indefinite contract and this assessment was conducted in accordance with the procedure laid down in the circular.

Nor does the Organization understand how the complainant can rely on an implicit promise to award him an indefinite contract, since he was perfectly well aware of the fact that his limited-duration contract could not be converted into an indefinite contract. He also knew that he had been offered the exceptional extension of his contract in 2004 precisely because he was not eligible for a long-term job. CERN adds that the complainant knew for what post and on what conditions he would be assessed, since he had received a description of the activity and the applicable procedure by e-mail on 25 July 2006, just as he knew that he would be assessed with three other candidates whose profiles were similar to his. Regarding the fact that the complainant did not have any information about the assessment of the other candidates and the comparisons drawn by the DCRB, the Organization points out that the above-mentioned circular does not provide for the disclosure of such information to candidates.

The Organization emphasises that a candidate's annual appraisal reports are only one of the factors considered by the DCRB.

Lastly, it denies any misuse of procedure. It explains that the complainant simply did not appear to be one of the two best candidates to whom an indefinite contract could be awarded.

D. In his rejoinder the complainant enlarges on his pleas. He maintains that in his case procedural irregularities arose from the lack of details about the available posts, which resulted in an obvious lack of transparency in the selection process. He also maintains that CERN's attitude led him to harbour legitimate expectations that he would be awarded an indefinite contract. The complainant considers that he has provided sufficient evidence that the disputed decision rests on a report omitting essential items of information and containing manifestly erroneous conclusions. He also considers that he has proved that the said decision was tainted with a misuse of procedure.

E. In its surrejoinder CERN reiterates its arguments.

CONSIDERATIONS

1. The complainant joined CERN on 1 October 1998 as a technical engineer (electronics) on a three-year limited-duration contract. This contract, dated 17 July 1998, specified that it could not be converted into an indefinite contract. On 1 October 2001 the contract was renewed for a period of three years ending on 30 September 2004, in accordance with the rules applicable at that time.

As he was not appointed to the post of technical engineer (electronics) on a fixed-term contract for which he had applied in the summer of 2003, the complainant agreed to a final three-year extension of his limited-duration contract until 30 September 2007; the relevant contract amendment, signed by the parties on 7 and 15 April 2004, stated that no further renewal or extension would be granted.

2. In 2006 two long-term jobs for technicians or technical engineers (electronics, electromechanics or electricity) became available within the manpower plan of the Physics Department.

The complainant was notified by the Organization that he could be assessed with a view to being appointed to one of these posts. An assessment procedure was carried out in which the complainant and three other staff members with similar profiles participated.

The DCRB concluded that the complainant fulfilled all the criteria for long-term employment, as specified in Administrative Circular No. 2 (Rev. 3) published in January 2006. However, it expressed some slight criticism of the complainant's initiative.

At the end of the assessment process the Head of the Physics Department proposed to the Human Resources Department that the complainant should not be awarded an indefinite contract. Although the complainant's supervisors and colleagues extolled his professional abilities, the Director-General decided on 30 March 2007 not to award him the contract in question.

3. The complainant lodged an internal appeal against this decision with the Joint Advisory Appeals Board. In its report of 22 October 2007 the Board recommended that the appeal should be dismissed. Nevertheless, the Board also recommended that the Director-General should "in the near future consider the [complainant's] candidature for a long-term post commensurate with his experience and qualifications and should give his case due sympathetic consideration". In support of this subsidiary recommendation it noted that the complainant had been the victim of an unfortunate situation, that he had been led to harbour legitimate expectations during the nine years when he had worked "on a difficult, but successful project and [that he had been] encouraged in this respect by his supervisors and colleagues", and that the DCRB had assessed him favourably "as a candidate meeting the criteria for long-term employment".

On 21 November 2007 the Director-General informed the complainant that he had decided neither to award him an indefinite contract nor to follow the Joint Advisory Appeals Board's subsidiary recommendation.

4. The complainant first submits that the procedure leading to the impugned decision is tainted with formal irregularities. He contends that the Organization breached its duty to publish vacancy notices as required by Administrative Circular No. 2 (Rev. 3). It should have given the candidates a precise description of the long-term jobs available instead of just sending them a sketchy description of several different posts making up a "range of jobs".

(a) According to paragraph 50 of the above-mentioned circular, the Director-General may award an indefinite contract provided that there is at least one long-term job available for the activity concerned within the department's manpower plan.

The award of an indefinite contract is one of the possible developments regarding the contractual position of staff members. As distinct from the requirements that apply when staff members are recruited, paragraph 50 does not presuppose the opening of the vacancy notice procedure set out in paragraphs 5 *et seq.* of the circular. To say the least, the opening of such a procedure would not be to the advantage of candidates already employed under a limited-duration contract who are seeking a permanent appointment.

(b) The Organization correctly applied paragraph 50 of the circular when it offered only two indefinite contracts to four candidates with similar profiles. This course of action obviously resulted in two candidates not being appointed while the other two were; but there is nothing in the circular to prevent candidates from competing in this way. All that is necessary is that candidates are selected on the basis of an objective, thorough assessment, in accordance with paragraph 56 of the circular, the content and scope of which will be examined later.

(c) Contrary to the complainant's submissions, the description of the available jobs which was attached to the e-mail of 25 July 2006 was not misleading. Moreover, this e-mail made it clear that the complainant could seek any information he might need, including details of the nature of the activities with which he would be entrusted in the event of his appointment.

(d) The criticism of the formal validity of the procedure thus proves to be unfounded. Consequently, the Tribunal need

not determine whether, as the Organization claims, this issue is irreceivable because it was not raised before the internal appeal body.

5. In substance the complainant taxes the Organization with breaching the requirement of reciprocal trust which derives from the general rule of good faith applying to relations between international organisations and their staff. He maintains that the refusal to award him an indefinite contract dashed the hopes inspired by his treatment under the Organization's previous contract system and, in particular, by the circumstances in which his contract was extended in 2004.

In addition, he denounces the procedure's lack of transparency, since he states that he did not know for what post and on what conditions he was competing.

This criticism is unfounded.

(a) It is indisputable that, during the procedure leading to the impugned decision, the Organization recognised, albeit with minor reservations, that the complainant fulfilled the criteria for the award of an indefinite contract.

The letter of 30 April 2007 which the Head of the Human Resources Department sent to the complainant's supervisors and colleagues is surprising in this respect. It states that the extension of his limited-duration contract in 2004 had been a favour and that the complainant's suitability for long-term employment was uncertain. Yet the evidence on file suggests that the decision to keep the complainant in a situation of temporary employment for nine years – the final extension of his contract being of an exceptional nature – was above all in the interests of the employer and cannot be seen as an advantage, let alone a privilege bestowed on the employee. Moreover, the documents produced before the Tribunal show on the whole that the complainant was well qualified, bearing in mind the tasks assigned to him over this period.

(b) This does not however imply, as the complainant asserts, that he may rely on an implicit promise that he would be awarded an indefinite contract. The last contract amendment signed by the parties in April 2004 contained nothing to engender any hope of a

subsequent permanent appointment, save for the possibility foreseen in paragraph 50 of Administrative Circular No. 2 (Rev. 3). On the contrary, the letter of 25 March 2004 from the Human Resources Coordinator indicates that the decision to grant the complainant an exceptional extension of his contract beyond the statutory six years was based in particular on the fact that a "long-term contract was not appropriate" for the activities which had been assigned to him. Nothing in the file suggests that the complainant accepted this final extension under duress or under any pressure from the Organization.

(c) The complainant is likewise mistaken in claiming that the procedure lacked transparency. From the outset he was offered the possibility of obtaining all the information he might need about the professional duties attached to the post he desired. He was also given adequate information about the procedure before the various bodies which dealt with his case and, in particular, about the assessment measures, which have not been shown to be discriminatory or incomplete. In order for the procedure to be transparent, it was not necessary to inform the unsuccessful candidates of the assessment of the other candidates' abilities, or of the reasons why two of them had been selected.

6. The complainant taxes the Organization with failing to take account of essential information, which, he says, led it to draw manifestly erroneous conclusions. He alleges that it did not seriously consider either the quality and diversity of the work he had done during his nine years of service, or the very favourable opinions of his supervisors who, moreover, took the view that the complainant's case had been treated casually. He maintains that an objective assessment of this information would necessarily have led to his being ranked among the best candidates.

The documents on file and the explanations furnished in the reply and surrejoinder regarding the assessment process show that, contrary to the complainant's allegations, the Organization took account of the essential information in his file. It was simply because other candidates were deemed to be better qualified than he was, irrespective of his skills and his previous performance, that the decision was taken not to

award him an indefinite contract. The Tribunal will not substitute its own assessment for that of the Organization's organs, which have not abused their discretion in this domain.

7. Lastly, the complainant alleges a misuse of procedure.

(a) Paragraphs 50 and 56 of Administrative Circular No. 2 (Rev. 3) read as follows:

> "50. The Director-General may award an indefinite contract provided that there is at least one long-term job available for the activity concerned within the manpower plan of the Department concerned.
>
> 56. Where the award of indefinite contracts to all the assessed staff members cannot be accommodated within Departmental manpower planning, only the best of those fulfilling the criteria shall be retained."

These two paragraphs are to be found in Chapter VI of the circular, entitled "Possible developments regarding the contractual position", under Section A, entitled "Award of an indefinite contract".

The complainant holds that staff members must have equal chances of obtaining an indefinite contract. According to him, paragraph 56 applies only where a competition is organised to fill one or more absolutely identical posts, but not where a competition is held for several different posts. This argument is tantamount to criticising the Organization's policy on the award of indefinite contracts; in the complainant's view, staff cuts mean that this policy leads CERN to award temporary contracts for excessively long periods, without giving the staff concerned any genuine prospect of a permanent appointment.

(b) There is certainly no doubt that a limited-duration contract should be extended beyond a six-year period only as an exceptional measure. Indeed, depending on the circumstances, such an extension is likely to give the person concerned, if not legitimate expectations of a permanent appointment in the near future, then at least the feeling that, contrary to the legal reality, he or she has acquired rights.

In the instant case the circumstances are not such as to engender such expectations. According to the information on file, the complainant was granted an exceptional extension of his limited-duration contract owing to the particular employment situation within the Organization. As stated earlier, the complainant freely accepted

this last extension in full knowledge of the facts and without expressing any reservations about his prospects of permanent appointment.

(c) The complainant does not give any good reason why the Tribunal should dismiss the credible explanations furnished in the Organization's submissions regarding the circumstances in which the two long-term jobs became available in 2006. He has not established that the two indefinite contracts were not in the same field of activity common to the technological groups and experiments of the Physics Department. There is no evidence to support his allegation that the decision not to award him an indefinite contract in fact disguised the abolition of a post.

(d) The application of Administrative Circular No. 2 (Rev. 3) did not therefore lead in this case to a misuse of procedure which unlawfully deprived the complainant of a legitimate prospect of being awarded such a contract on the basis of paragraph 50 of the said circular.

By selecting the candidates who objectively appeared to be the best of those possessing the requisite qualifications, the Director-General complied with the letter of paragraph 56 of the circular and did not neglect the duties incumbent on him when taking a discretionary decision.

8. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet