

**SEVENTY-EIGHTH SESSION**

***In re* PENNY**

**Judgment 1415**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Eddy Penny against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 15 December 1993, CERN's reply of 11 April 1994, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 24 October 1994;

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. Information relevant to the present dispute is set out, under A, in Judgment 1412 (in re Audria) also delivered this day.

The complainant, a Frenchman born in 1944, was at the material time employed by CERN as an "administrative assistant (accounting)" at grade 7 in the Finance Division.

By a letter of 14 February 1992 the Leader of the Personnel Division informed him of a decision to put him on career path IV.

In a letter of 27 March to the Director-General he appealed and asked to be placed on path V. On 30 April 1992 the Director-General told him of the referral of his case to the Joint Advisory Appeals Board.

The complainant also put the matter to CERN's ombudsman. In a report of 16 September 1992 the ombudsman recommended that the complainant's duties be "compared with similar ones assigned to staff members of the Finance Division who are on path V". If the comparison showed that CERN had discriminated against him it should put him on path V; otherwise he should be considered for exceptional advancement.

In a report dated 5 January 1993 the Joint Advisory Appeals Board recommended path V.

By a letter of 3 March 1993, the impugned decision, the Director-General rejected his appeal but undertook to grant him exceptional advancement in 1993.

B. Citing the documents dated 21 May and 3 October 1991 which are referred to in the above-mentioned judgment under A, the complainant submits that CERN failed to comply with "the substantive rules on the initial designation of career paths".

The Administration failed to take account of his professional attainments and potential, and his division did not propose putting him on a higher path as it was free to do for "staff whose present functions and/or future potential are judged to be insufficiently reflected in the provisional designation".

On the strength of comparison of his position with that of others who had similar duties, he submits that the impugned decision was also unfair.

Lastly, he says that CERN leaves him no hope of advancement and that that is very discouraging.

He seeks the quashing of the Director-General's decision of 3 March 1993, assignment to career path V as from 1 March 1992, moral damages and costs.

C. In its reply the Organization contends that the procedure for designating his career path - the purpose of which was not advancement - was carried out according to objective criteria and in compliance with the applicable rules.

CERN says it went thoroughly into his case and took account of his potential. It points out that "potential" does not include quality of performance or his qualifications, but simply affords an opportunity of taking into consideration any "emerging" duties. In any event the Organization determines at discretion whether the criteria are relevant.

The decision he impugns is fair: the Director-General took it on the ombudsman's recommendation and in "full knowledge of the material facts".

Prospects of further advancement are a general objective not a criterion of any relevance to the advancement scheme. In making the plea he has failed to show what rule CERN may have infringed. In any event, far from dashing hopes, the new scheme enhances prospects of advancement. So there is nothing "discouraging" about it.

Lastly, CERN argues that his claim to moral damages is irreceivable because he puts no figure on it and is, besides, devoid of merit.

D. In his rejoinder the complainant enlarges on his pleas. He maintains that the scheme should not "depreciate" the attainments of staff. He says that the criteria CERN chose were not objective and that it was bound to abide by the general principles underlying the scheme. The definitions used to determine his potential and the level of his duties overlooked his qualifications and experience and were therefore wrong.

E. In its surrejoinder CERN demurs at the complainant's attempt to replace the criteria in the Instructions with others more to his liking. It observes once again that his reference to general principles on the designation of career paths is irrelevant: the only issue is whether the Administration followed the proper procedure. It points out that it agreed to his exceptional advancement in 1993 and submits that the conditions for an award of moral damages are not met.

#### CONSIDERATIONS:

1. On 1 August 1991 CERN brought in a new Merit-Oriented Advancement Scheme and career structure which the Tribunal described in Judgment 1354 (in re Guyen) and another judgment delivered on this day (No. 1412, in re Audria). The Tribunal refers to that description and need say nothing further here by way of explanation of the scheme.

2. The complainant joined the staff of CERN on 1 October 1966 at grade 4 as an office clerk in the Finance Division. He got promotion several times and became an administrative assistant (accounting) at grade 7 in 1985. When CERN brought in the new scheme it put him provisionally on path IV because his duties fell in category 5b and he had reached grade 7 at the age of 40. A decision of 14 February 1992 endorsed a proposal from the Personnel Division to keep him on path IV. He appealed to the Joint Advisory Appeals Board and also sought help from the ombudsman.

3. The ombudsman reported on 16 September 1992. He praised the complainant's personal qualities and professional attainments and recommended comparison of his duties with the similar ones of staff in the Finance Division who were on path V. If the treatment of him proved to have been discriminatory his path should be changed; if not, he should get exceptional advancement as soon as possible.

In the light of these recommendations and at the request of the Joint Advisory Appeals Board the Personnel Division made an analytical appraisal of the complainant's actual duties. The Division found that the level was "nearer that of a colleague at grade 7 (now path IV) than that of two colleagues at grade 8 (now path V)" and that the original classification of grade 7 was right for the purpose of provisional allotment of career path.

4. The Appeals Board in turn noted that his performance, conscientiousness and professional attainments were much appreciated and, after studying the reports already referred to, it recommended changing his path from IV to V.

5. By a decision of 3 March 1993 the Director-General confirmed his assignment to path IV though he said that for reasons of merit he would go into the exceptional section of path IV for 1993.

6. The complainant has but one plea in favour of quashing that decision, CERN's breach of the rules on the provisional determination of career path. He says that the Administration discounted his potential and that putting him on path IV was discriminatory, dashed his hopes of advancement and left him disappointed and discouraged.

7. Despite his merit, which CERN acknowledged by granting him the exceptional advancement in 1993, the plea fails. As stated in Judgment 1354 and others delivered this day on similar cases, the Tribunal has limited power of review over the Director-General's appraisal of performance for the purpose of choosing career paths. The complainant's duties being those of an administrative assistant (accounting), there was no obvious mistake in putting him on path IV, the one that applies to "Technical, Clerical/administrative, Master craftsmanship, Skilled craft/office work supervision". In any event, however important his duties may have been the complainant has offered no evidence to suggest that path V, which corresponds to higher technical or higher administrative tasks, was obviously the right one for him. Nor has he shown that any other officials whose duties were on a par with his were put on a higher path; and the report in the case records from the Personnel Division does not bear that out either.

8. Whatever construction is to be put on the notion of "potential", CERN plainly did not underestimate the complainant's, of which everyone who had occasion to rate him thought highly.

9. The conclusion from the foregoing is that his plea and so also his claim to moral damages must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas  
Michel Gentot  
P. Pescatore  
A.B. Gardner