

## **EIGHTY-SECOND SESSION**

### ***In re* Seissau (No. 2)**

#### **Judgment 1582**

The Administrative Tribunal,

Considering the second complaint filed by Mrs. Maryse Seissau against the European Organization for Nuclear Research (CERN) on 2 February 1996 and corrected on 11 March, CERN's reply of 31 May, the complainant's rejoinder of 23 August and the Organization's surrejoinder of 18 October 1996;

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. Facts material to this dispute are set out under A in Judgment 1416 on Mrs. Seissau's first complaint. In that case she challenged a decision of 3 March 1993 by the Director-General to put her on career path III. The Tribunal found no evidence to bear out the Director-General's contention that her duties differed "in level of performance" from those of a former colleague of hers who had been put on path IV. Being unable to review the reasons for his decision or tell whether it offended against equity, the Tribunal set the decision aside and sent her case back for the Organization to take a new decision on her career path "in keeping with the material rules".

In execution of that judgment the Director of Administration sent her a letter dated 21 July 1995 confirming her assignment to path III on the grounds that it matched her duties at the date of the decision she had been objecting to; her colleague had got path IV on account, not of her duties at the time, but of those she was likely to be given on the strength of good performance, in other words, of her "potential".

By a letter of 13 September 1995 the complainant appealed to the Director-General and applied for leave to go straight to the Tribunal in the event of rejection.

By a letter of 9 November 1995, the impugned decision, the Director of Administration rejected her appeal on the Director-General's behalf and granted her the leave she wanted.

B. The complainant submits that CERN is making out that she no longer objects to being on path III and has drawn plainly wrong conclusions from the evidence.

She observes that the "Instructions for the designation of career paths to present staff members", issued on 3 October 1991, say that such "designation":

"has to be fair to all staff, as objective as possible, and to normally place staff in a career path where they have reasonable prospects for future ... advancement."

She pleads unfair treatment in that she and the other staff member were in like case when set on different paths. To her mind CERN fails to prove that it had any intention at the material time of changing her colleague's duties or told the Joint Advisory Appeals Board as much in explicit terms. Not until mid-1993 did her colleague actually get new duties.

She accuses CERN of bad faith in trying to explain away her career path by arguments it never offered in the pleadings on her first complaint.

She wants the Tribunal to quash the impugned decision and have her career path changed from III to IV as from 1 March 1992. She claims moral damages and costs.

C. In its reply CERN says that the assessment of the level of her duties is *res judicata* because Judgment 1416 found no obvious flaws in that assessment. So the only material issue is whether the manner of executing that judgment was fair.

CERN says that it abided by the rule of equal treatment: the reason why the other staff member got path IV was indeed that it had decided to give her new and higher duties. That is plain from a memorandum of 4 November 1991 in which the other staff member's supervisor said that she could take on more responsibility in the context of reforms of her unit, Financial and Accounting Services. The head of Classification and Remuneration Services so informed the chairman of the Appeals Board in a memorandum of 16 November 1992. The reason why the other staff member did not take on the new duties until mid-1993 was delay in the reforms for technical reasons which could not be foreseen at the time the career path was chosen. Though the complainant may think it unfair that CERN kept the other staff member on path IV notwithstanding, the delay makes no difference: a firm line of precedent has it that "a staff member may not rely upon an unlawful act or a benefit granted *ex gratia* to other staff in support of his own claim": see, for example, Judgment 1321 (*in re* Bernard).

The defendant submits that it was merely acting on Judgment 1416 in explaining its reasons for putting the complainant's former colleague on a higher path and so may not be accused of bad faith. The complainant was already aware of the facts underlying that explanation: the Director-General told her in his letter of 3 March 1993 that he was rejecting her appeal because he did not consider her duties to be on a par with her colleague's in "level of performance", and he was thereby acknowledging her colleague's potential.

D. In her rejoinder the complainant points out that she has never challenged the lawfulness of the decision to set the other staff member on path IV. What she is saying is that it was unfair to put her on path III although at the time both of them were in the same position. In its reply to her first complaint the defendant argued that the Director-General had reviewed the level of her duties as against her colleague's at the time. What is more, in the hearings before the Appeals Board CERN spoke, not of her colleague's "potential", but merely of "other" reasons for choosing path IV.

E. In its surrejoinder CERN maintains that the complainant's duties fit path III. She and her former colleague not being in like case, there has been no breach of equal treatment. The fuller explanation the Organization gave in the letter of 21 July 1995 corrected the oversight identified in Judgment 1416 and enlarged on the letter of 3 March 1993.

## CONSIDERATIONS

1. The salient facts of this case are set out in Judgment 1416, which the Tribunal delivered on 1 February 1995 on the complainant's first complaint. That judgment set aside a decision that the Director-General had taken on 3 March 1993 to put the complainant on career path III and sent the case back for a new decision by CERN on the "designation" of her career path. It dismissed most of her pleas. It rejected the one about her age, under 5. In 6 it rejected her contention that there had been obvious misappraisal of her duties, even though it held that path IV would not have been out of the question; and it also disallowed her plea that path III had denied her reasonable prospects of advancement and disregarded her interests and the need to encourage her. The Tribunal was unable, however, to make a final ruling on her contention that putting someone with like duties on path IV had been in breach of equal and equitable treatment. The Joint Advisory Appeals Board had declared their duties and responsibilities to be comparable. Though the Director-General thought the comparison too narrow, neither the text of the impugned decision nor the evidence suggested where any difference might lie. So in 7 the judgment set the challenged decision aside for want of an adequate explanation and sent the case back for CERN to take a new decision "in keeping with the material rules". Since she had shown no material injury and since the quashing of the decision gave her "sufficient redress" for the moral injury she had alleged, the judgment said in 8 that no awards were due on those counts.

2. By a decision of 21 July 1995 the Director of Administration kept her on path III. He explained that, although she and the other staff member had similar duties and responsibilities, the reason why the other had been put on path IV went back to the date of the original decision. It was -

"the duties that the Financial Division had decided on the strength of past performance to give her in the context of the reforms scheduled for the first half of 1992. So CERN set her on path IV because of her potential. For wholly technical reasons the reforms were unfortunately held up, and so was her assumption of new duties, until mid-1993."

That is why the complainant thought she had been discriminated against.

Having sought to no avail to have the decision changed, she was granted leave to come straight to the Tribunal.

3. She has three pleas.

(a) The conclusions that the impugned decision drew from the evidence were obviously wrong in assuming that she was no longer challenging the decision to put her on path III.

(b) There was breach of the rules on fair treatment. She suspects that to hide its breach of equal treatment CERN made up *ex post facto* the argument about the other staff member's new duties.

(c) CERN was in bad faith. At the outset it said nothing, at least to the complainant, of the reason it is now offering. Good faith precludes its bringing up a new issue to her detriment.

CERN pleads *res judicata*. The complainant is, it says, mistaken: it intended all along to put the other official on path IV on account of her potential, and that is provided for in the "Instructions for the designation of career paths to present staff members" of 3 October 1991. She was soon to take on new duties and responsibilities in the reformed unit. Though told as much, the Appeals Board overlooked the issue in recommending that both officials be on path IV. CERN's reason for failing to tell the complainant at the time why it was treating them differently was that it did not want to disclose privileged information about someone else's career.

4. The Tribunal's judgments -- including, of course, remand for a new decision -- are binding on both parties and indeed on the Tribunal itself.

So the complainant may not properly object to being put on path III on any grounds other than unfair treatment. Her claim to moral damages is equally misconceived. Some of her pleas are really challenges to CERN's original decision, not to the one impugned in this complaint. So she is wrong to take CERN to task for misleading her and the Tribunal in failing to disclose the real reason for treating the other staff member differently. It was because of CERN's failure to give an explanation that the Tribunal ruled as it did in the earlier judgment, rejecting her claims to material and moral damages and granting her costs. The same failure affords no grounds for allowing her second complaint as well. All that need now be determined is whether in taking the impugned decision the Director-General acted as ordered and whether his explanation squares with equal and equitable treatment as between the two staff members.

5. The Tribunal is satisfied that at the time of the original decision the Organization intended soon to give more demanding duties and responsibilities to the other staff member than to the complainant and for that reason treated their cases differently. So there is no need to determine whether it might have based its later decision on new circumstances that it had never had in mind when taking its original decision.

What led their supervisor in his memorandum of 6 November 1992 to propose putting the complainant's colleague on path IV was the intention of giving her new duties. The head of Classification and Remuneration Services so informed the Appeals Board in a memorandum dated 16 November 1992, though the complainant got no word of that at the time.

6. The "Instructions for the designation of career paths to present staff members" say:

"The criteria used will be the staff member's present classification and level of function together with his/her potential."

The complainant challenges neither the criterion of "potential" nor the way in which it was applied to her colleague's benefit. Since the two officials were not in the same position, there cannot have been any breach of equal treatment.

7. The nub of the complainant's case is that, as presented at the time of the original decision, the facts suggested that they were in like case, and that led her to claim path IV by virtue of her right to equal treatment. That is why, to her mind, CERN acted in bad faith and therefore had a duty to put her on the higher path.

But her pleas betray misunderstanding of Judgment 1416 and the *res judicata* rule. What is plain is that CERN was not bound by its inadequate attempt to explain how its original decision had respected equal and equitable

treatment. It had to take a new decision, a difference in treatment being warranted only if the two officials were not in like case. So it was free to come to the same conclusion about the complainant's career path provided it could show that they were not.

Judgment 1416 awarded redress for CERN's failure to account for its first decision and in particular did not allow her claim to path IV.

Her second complaint is utterly devoid of merit.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

*(Signed)*

Michel Gentot  
E. Razafindralambo  
Egli  
A.B. Gardner