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

**EIGHTY-FIFTH SESSION**

***In re* Kunstein-Hackbarth**

**Judgment 1780**

The Administrative Tribunal,

Considering the complaint filed by Mrs. Eva Kunstein-Hackbarth against the European Southern Observatory (ESO) on 6 May 1997 and corrected on 25 August, the ESO's reply of 27 October, the complainant's rejoinder of 4 March 1998 and the Observatory's surrejoinder of 6 April 1998;

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. The complainant is a German who was born on 2 May 1932. The Observatory employed her from 2 May 1972 until 1 May 1997, when she retired. At the material time she was a procurement officer.

On 1 July 1968 the ESO signed an agreement with the European Organization for Nuclear Research (CERN) to allow a few ESO staff to join the Pension Fund of CERN. On 2 December 1982 the Council of the ESO confirmed its application to the Fund and made participation compulsory for everyone it recruited thereafter. Anyone who had earlier opted for some other pension scheme was free either to stay in it "without further improvements or supplements" or to join the Fund with retroactive effect. After talks the two organisations concluded another agreement on 1 July 1983 that endorsed the new provisions. In a memorandum of 5 July and a circular of 27 July the head of Administration of the ESO gave its international staff information about the agreement.

For anyone who chose to stay in a national pension scheme the Observatory opened a "social security account" into which it paid contributions equivalent to 14 per cent of basic salary. Over the years since December 1982 its share of contributions to the CERN Fund has steadily risen and now comes to 25.29 per cent of basic salary, whereas the rate of its contributions to national pension schemes has stayed constant.

By a memorandum of 24 November 1994 the head of Administration gave international staff members who, like the complainant, held social security accounts one last opportunity of joining the CERN Fund. After preliminary correspondence the complainant told Personnel Services by a memorandum of 25 January 1995 that she intended to buy 93 months' membership of the Fund, corresponding to the period from 1 April 1987 to 31 December 1994; she wanted to be treated as a member of the Fund for that period and so to have the ESO recalculate the amounts of its contributions on her behalf. The ESO did not reply.

On 31 March 1995 an administrative officer of the Fund told her that the Fund had received the transfer of 130,970 Swiss francs, the equivalent of 93 months' contributions, and that she was a member of the Fund from 1 January 1987.

On 28 June 1996 she sent a memorandum to the head of Administration of the ESO pointing out that she had got no answer to her memorandum of 25 January 1995 and again asking the Observatory to recalculate its contributions for the years of membership she had just validated. In a memorandum of 22 November 1996 the head of Administration refused on the grounds that on getting notice of the Council's decision of 2 December 1982 she had opted to stay in a national pension scheme.

By a memorandum of 20 January 1997 she lodged an internal appeal against the decision of 22 November 1996. In a letter of 4 February 1997, which she is impugning, the head of Administration replied on the Director General's behalf that the letter of 22 November 1996 was not to be treated as a new decision on her memorandum of 25

January 1995 and that her appeal was therefore time-barred.

B. The complainant submits, as to receivability, that the memorandum of 22 November 1996 expressly rejects the claim she first put on 25 January 1995 and pressed on 28 June 1996. When an organisation takes a decision on the merits of a claim without objecting to it as irreceivable, it is estopped from raising such objections in the context of a complaint to the Tribunal. In any event the decision of 22 November was not mere confirmation of the earlier one; so it set off a new time limit for appeal.

On the merits the complainant pleads breach of the Observatory's duty to keep its staff abreast of any action that threatens their rightful interests. It failed to give her notice of the decision of 2 December 1982 since at the time it did not publish decisions by its Council. The text was not appended to the memorandum of 5 July 1983 or to the circular of 27 July 1983. Even if she had been aware of it, however, that would have made no difference since it failed to bring out properly the financial consequences of the choice she was being offered.

The Observatory caused her undue and serious moral injury by taking months to let her have a reply.

She seeks the quashing of the decision of 4 February 1997 and an award of costs.

C. In its reply the ESO contends that her complaint is irreceivable. Under Article R VI 1.05 of the Staff Regulations the Director General's failure to answer a claim within 60 days implies rejection of it and the staff member then has another 60 days in which to appeal. So the time limit for appeal against the implied rejection of the complainant's claim of 25 January 1995 had expired by 28 June 1996. Her letter of that very date called for no new decision: that is why the head of Administration's memorandum of 22 November 1996 merely recited the facts and did not go into the matter all over again.

On the merits the ESO says that its offer of 24 November 1994 of membership of the Pension Fund of CERN was quite straightforward: it said nothing to suggest that the ESO might help officials to buy periods of contributory service. Besides, it could not itself have known back in 1983 that the CERN Fund would eventually be letting everyone join. So how could it have warned her that her staying in a national scheme would preclude its recalculating its own share of contributions if she got a chance to join the Fund later?

It did give her notice of the Council's decision of 2 December 1982. In the staff circular of 27 July 1983 the head of Administration announced that to safeguard the acquired rights of anyone still with a national scheme the then arrangements would hold good, and he cited Article R VIII 2.02 of the Staff Regulations, the gist of which is that entitlements recognised as acquired rights are inviolate. So the complainant had no reason to expect the Observatory to recalculate retroactively the amount of its own contributions.

D. In her rejoinder the complainant challenges the ESO's reading of the memorandum of 22 November 1996. It did, she maintains, amount to express rejection of a claim she had made twice, on 25 January 1995 and 28 June 1996. Her appeal of 20 January 1997 being in time, her complaint is receivable.

On the merits she submits that, although the ESO told her she might join the Fund of CERN, it never let on that it would have to contribute much more to that Fund than to any national scheme. Indeed a memorandum of 19 February 1981 from Personnel Services shows that all along it meant to contribute on the same scale to both.

E. In its surrejoinder the ESO presses its objections to receivability. On the merits it rebuts the complainant's charge of failing to give her proper information on the pros and cons of the two options. The memorandum of 19 February 1981 is to be read in the context prior to 2 December 1982, which changed when everyone became free to join the Fund. The staff were then told that the rates of the ESO's contributions for them to national schemes would be frozen.

## CONSIDERATIONS

1. The ESO employed the complainant from 2 May 1972 until 1 May 1997, when she retired. When she left she was a procurement officer at step 13 in grade 8.

Since 1968 the ESO has had arrangements to let its staff join the pension scheme of CERN. When the complainant took up her appointment, membership was not compulsory: the other options were membership of a national pension scheme and subscribing to a private one.

New officials later had to join the CERN scheme - see Judgment 1665 (*in re* Palma) - whereas serving staff were left free to choose so as to safeguard their acquired rights. For those who, like the complainant, chose to stay with a national scheme the ESO withheld 7 per cent of pay as their contribution and paid 14 per cent as its own. The total of 21 per cent was paid into a "social security account" in the official's name. Sums due to the scheme were paid out of that account.

As the complainant observes, the ESO has since repeatedly invited staff to join CERN's scheme if they have not yet done so.

Arrangements having been agreed on with CERN, the Council of the ESO changed tack in 1983. The gist of the decision it then took was that for holders of social security accounts contributions would still total 21 (7 + 14) per cent of pay, but contributions for members of the CERN scheme would keep pace with the rates applicable to CERN staff. The Observatory announced in a staff circular of 5 July 1983 that for anyone who then joined the CERN scheme the rates of contribution would be 7.82 per cent from the official and 17.68 from the Observatory.

The ESO went on paying 14 per cent for the others but the rate at which it contributed for members of the CERN scheme rose steadily. The complainant herself gives the following figures, which she does not say had been kept secret, for the percentage rate of the ESO's contributions:

1987 and January to June 1988 19.74

July to December 1988 and 1989 20.35

1990 20.97

1991 22.20

1992 23.44

1993 24.67

1994 25.29

In a memorandum it sent to the staff on 24 November 1994 the ESO announced that holders of social security accounts were to have a last opportunity of joining the CERN scheme.

The complainant expressed interest and asked whether she might validate contributory service from 1 April 1987. After checking with CERN the ESO answered that she might do so at the cost to her of 130,970 Swiss francs.

2. By a memorandum of 25 January 1995 she applied for membership of the CERN scheme as from 1 January 1995 and for validation of the period from 1 April 1987 up to 31 December 1994 at the cost of 130,970 Swiss francs, the sum to be charged to her social security account. She also wanted to be put retroactively on a par with anyone who had been in the CERN scheme since April 1987. That would require the Observatory to make up the shortfall in the rates of its own contributions. In an appendix to her memorandum she put the cost to the Observatory at 55,324.90 German marks.

She was then told that, the sum of 130,970 Swiss francs having been paid to the CERN scheme, she had pension coverage as from 1 April 1987. The ESO called on her to pay another 28,323.23 marks to make up the sum due to the CERN scheme, and she did so soon afterwards.

In a letter of 28 June 1996 to the head of Administration she asked that the ESO pay the sums due to cover the shortfall in its own contributions.

On 22 November 1996 the head of Administration told her that the ESO could not agree; in 1982 its Council had decided that its contributions for anyone not covered by CERN's pension scheme would remain unchanged, whereas for any member of that scheme they would match those made for CERN officials; the staff had been so informed; the complainant had quite advisedly opted at the time not to change schemes; so her claim to payment of arrears from the ESO was quite groundless.

On 20 January 1997 she appealed.

On 4 February 1997 an official acting on the Director General's behalf rejected her claim on the grounds that her appeal was time-barred: the ESO had impliedly rejected her claim when it had made payments to the CERN Fund; the decision of 22 November 1996 had merely confirmed the substantive decision and set off no new time limit for appeal; so her appeal had missed the 120-day time limit. Besides, the decision was in line with the Council's policy.

3. The complainant is asking the Tribunal to set aside the ESO's decision of 4 February 1997 and afford her full redress. To sum up, she pleads that her internal appeal was receivable: the decision she challenged was not just confirmation but went into the merits and said nothing of receivability. What is more, it was unfounded. For the first time she charges the Observatory with breach of its duty to keep her informed and says that she made her choice on the strength of wrong information. In her submission she may, on account of the adverse consequences of her choice, be deemed to have joined the CERN scheme from the outset.

The Observatory asks the Tribunal to dismiss her complaint. It presses the arguments on receivability that the Director General gave on her internal appeal and denies misleading her by failing to provide information.

*Receivability*

4. If the complainant's internal appeal was time-barred and therefore irreceivable she has failed to exhaust her internal remedies and her complaint too is irreceivable in accordance with Article VII(1) of the Tribunal's Statute.

The ESO did answer her application for validation of contributory service. But there is room for doubt that its answer may be taken to imply rejection, let alone that its failure to answer her memorandum of 25 January 1995 may be seen as rejection of her claim to retroactive membership: that memorandum did not in so many words claim retroactive membership.

In any event the ESO rejected her claims on the merits without reserving the issue of receivability. In so doing it took a decision, possibly a new one, that was open to appeal.

In declaring that it was not so open, the Director General made a mistake of law, and on that score he must stand corrected.

Since the impugned decision also goes to the merits, the Tribunal may entertain them as well.

*The merits*

5. The complainant appears in her internal appeal to have been relying on equity: she wanted to be put on a par with those who had already opted for the CERN scheme.

Equality of treatment means that an international organisation must treat its staff alike only if they are in like case. But here the condition was not met: those who had chosen of their own free will not to join the CERN scheme when given the chance to do so were not in the same position in fact and in law as those who had taken that option.

It is not alleged, let alone proved, that any ESO rule allowed someone on its staff who had not taken up the option to do so later and to get the employer to pay arrears of contributions accordingly. Nor did the complainant say in her internal appeal that the Observatory had failed to give her enough information.

6. Not until she filed this complaint did she allege breach in 1983 of the Observatory's duty to inform its staff of the pros and cons of the options. She contends that what it then told them failed to make it plain that its Council would never raise the rates of the employer's contributions for someone who later wanted to join the CERN scheme. At the time, she points out, it even suggested in its memorandum of 5 July 1983 helping anyone who wanted to join the CERN scheme but for whom the validation of prior service proved too costly. The Observatory ought in 1995, before she validated prior service, to have warned her that it would not be retroactively raising its own rates of contribution. Neither in 1983 nor in 1995 had she been able to act "advisedly". So the Tribunal should set aside the impugned decision and grant her full redress. She does not explain how otherwise her interests may have suffered.

(a) According to consistent precedent both employer and employee must show good faith. For the organisation, that means giving its staff notice of any facts or rules that may influence their dealings with it: see for example Judgments 323 (*in re* Connolly-Battisti) under 22; 364 (*in re* Fournier d'Albe) under 12; 869 (*in re* Hill) under 19; 946 (*in re* Fernandez-Caballero) under 6 and 7; 1245 (*in re* Müller) under 16; 1479 (*in re* Gill No. 2) under 12; and 1526 (*in re* Baigrie) under 2.

But of course the organisation will not be financially liable unless the staff member has suffered financial injury.

(b) This case is about the ESO's regular contributions towards the complainant's pension entitlements.

Regular payments by an employer, whether in the form of salary or of some other benefit, amount to decisions that may be challenged at the time. Failing such challenge they become final and may be challenged thereafter only if there are grounds for review of administrative action. So a claim to retroactive increase of salary and entitlements is barred: see Judgments 1530 (*in re* Haenni and Perruchi-Haenni) under 7 and 8; 1664 (*in re* Cook No. 7 and Rosé No. 2) under 6; 1682 (*in re* Argos and others) under 3 and the precedents cited therein. By the same token the Tribunal will not allow any claim to damages arising out of a decision that has taken effect and gone unchallenged: see Judgment 1559 (*in re* Durand-Smet) under 2 and 3.

At issue here are the ESO's contributions for the complainant from 1 April 1987 to 31 December 1994. The Observatory made those contributions in regular payments and in amounts which the complainant did not challenge at the time. Only if there were grounds for review of some administrative decision could those amounts be changed *a posteriori*. The burden of showing such grounds lies on the party who wants the amounts changed.

One admissible plea for review is the discovery of some new fact which, had it been known at the time, would have prompted a different decision. There is clearly no such new fact here. In the end the complainant opted for the CERN scheme. The ESO's original decision was about the status of the official who had opted to stay with a national pension scheme and it held good for as long as the official did not change to the CERN scheme. Such change at a later date could have no effect on the validity of the original decision.

In the complainant's submission the grounds for review are apparently that that decision was flawed because her own choice of option was itself flawed for want of proper information and the ESO should be required to act as it would have done if she had had such information at the time.

For the reasons set out below there is not sufficient evidence to suggest that the flaw existed at the material time or that any defect may have led her to choose a course that was not in her best interests: see Judgment 1526, under 2.

(c) The material time was not 1983 but the period from 1 April 1987 until the end of 1994, when the Observatory was regularly paying pension contributions for her and when she herself says she had many opportunities of joining the CERN scheme.

It is hard to say now just what the staff were being told at the outset, for example in 1983. Besides the circulars, they were receiving, or had available, relevant information from the ESO's secretariat, from CERN's administrative services and from staff associations. Oddly enough, the complainant gives scarcely any information on that score. All she argues is that the staff circulars said nothing of the Council's decision never to change the rates of contribution for those who opted for a national scheme.

In any event from 1987 to 1994 the ESO's contributions and the deductions it made from staff pay stayed constant for anyone who took that option whereas for anyone who had opted for membership of the CERN scheme the rates of deduction from pay and of the ESO's own contributions went steadily up. The complainant must have realised that. Indeed when she claimed from the ESO retroactive payment of the higher contributions she did not profess ignorance of the difference in rates until then. So there is no evidence to suggest that she was misled from 1987 to 1994 when she was still free to change over to the CERN scheme.

The conclusion is that, though aware of the differences in rates of contribution, she asked neither to join the CERN scheme nor to have the Observatory increase its rates of contribution, and the lack of information she alleges had no effect on her financial entitlements.

(d) That conclusion holds good in answer to her plea that the ESO failed to give her proper information when she was validating service from 1987.

When expressing interest in such validation she asked the ESO whether it might raise the rates of contribution retroactively. Later, though she had had no answer to that question, she confirmed her intention of validating service and then paid in full the sum due, namely the difference between the cost of validation and the amount in her social security account with the ESO. She thereby showed her willingness to validate prior service whether or not the ESO retroactively raised the rates of contribution. So again the alleged lack of information did not prompt her to take any action damaging to her financial interests.

Her pleas do not call for review of the decisions on which the ESO's contributions were based.

(e) She does not offer any other plea warranting retroactive payment by the Observatory of contributions at higher rates.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

*(Signed)*

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.