

NINETY-FIFTH SESSION

Judgment No. 2218

The Administrative Tribunal,

Considering the complaint filed by Mr A. M. against the European Organization for Nuclear Research (CERN) on 7 February 2002 and corrected on 8 March, CERN's reply of 13 June, the complainant's rejoinder of 10 July and the Organization's surrejoinder of 10 October 2002;

Considering Articles II, paragraph 5, and VII 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's career is summed up under A of Judgment 2173, delivered on 3 February 2003. In that judgment the Tribunal dismissed a second complaint filed by the complainant, in which he sought promotion to grade 12 - the exceptional advancement grade in career path VIII. He had been promoted to grade 11 of that career path in July 1992 under the "Merit-Oriented Advancement Scheme" (MOAS) and the related career structure. In August 2001 he held grade 11, step 13.

CERN implemented a new career structure on 1 September 2001. It had been announced to staff in July 2001 in a document headed "An overview of the Merit Advancement and Promotion Scheme (MAPS) and implementation measures". That document indicated how staff would be assimilated into the scheme. The new structure encompassed a different salary grid and career path system as well as a new advancement and promotion system. Salary bands were to replace grades and henceforth there would be seven career paths (A to G). Career path F replaced the previous path VIII and unlike certain other paths, it had no exceptional advancement grade. In each of the career paths there were to be three separate salary bands, referred to as a, b and c. Fb corresponded to the former grade 11 and it contained only 12 steps. Paragraph 9.3 of the document distributed in July 2001 read:

"Staff whose previous salary level is outside the new grid will be assimilated at their previous salary level on a personal basis."

By a letter of 15 August 2001 the Leader of the Human Resources Division told the complainant that from 1 September he would be integrated into the new structure at his existing salary level, and would be in career path F, at salary position p0. The letter indicated that for technical reasons "personal" salary positions may be printed as band 'p'. He asked the complainant to sign and return the letter within 60 days. The complainant did not sign it. Instead, he appealed to the Director-General on 12 October 2001 against the decision to integrate him into position Fp0. He wanted a correction made to the overall structure, so that staff at his former grade and step could be "included in the new salary grid".

In a letter of 15 November 2001 the Director of Administration informed the complainant that the Organization was taking steps to convene the Joint Advisory Appeals Board but it would be some time before he was notified of its composition. Writing again on 28 January 2002, the same Director told him that his appeal regarding his assimilation into the new career structure had been suspended pending the outcome of one he had filed in December 2001 contesting his non-promotion to grade 12 of career path VIII in the previous career structure. This was because if his appeal regarding grade 12 was successful his personal situation would be adjusted from 1 July 2001 which could in turn affect the way he was assimilated into the new scale.

The Board heard his appeal regarding grade 12 in July 2002 and the Director-General issued a final decision on that case on 20 August 2002. Meanwhile, the complainant had filed this complaint with the Tribunal challenging the implied rejection of his claims concerning his position in the new scale.

B. The complainant submits that the two internal appeals that he lodged were separate and independent matters. He asserts that he is justified in bringing the issue that led to his appeal of 12 October to the Tribunal as 60 days have elapsed since he filed it and the Board has not been convened.

He submits that staff in path VIII, grade 11, step 13 on the old scale would logically expect to be on Fb13 in the new one, but that position does not exist. They have instead been placed on Fp0, a "temporary position outside the salary scale". His main contention is that the Administration's action is discriminatory and disregards his acquired rights. The Organization seems to be excluding senior staff members from the new salary scale on the grounds that their careers are over and cannot evolve further, but it does not have the right to do that. The fact that staff did not lose out on salary does not legitimise its actions. By the very nature of their employment conditions as international civil servants they are led to expect a definite position within the salary scale and the complainant fears the unforeseen consequences deriving from their exclusion.

The complainant is asking to be placed on position Fc6 in the new salary scale - one position higher than on the old scale, with the resultant increase in salary.

C. In its reply the Organization submits that the complaint is irreceivable. Firstly, the complainant has come to the Tribunal without waiting for a final decision on his internal appeal of 12 October 2001 and he has therefore not exhausted the internal means of redress. There is no implicit rejection of that appeal; the two he had filed needed to be settled in a logical sequence and the first was only suspended, and he is mistaken in stating that the Organization failed to act within 60 days of receiving it. Secondly, his request to be assimilated at level Fc6 constitutes a new claim, having been made for the first time in his complaint to the Tribunal.

On a subsidiary basis it argues that the complaint is devoid of merit. It points out that the new salary band "Fb" corresponds to the previous grade 11, but contains only 12 steps, whereas grade 11 had 13. Those staff members who held grade 11, step 13, were placed on a temporary personal salary position "p0" with a remuneration level above salary band Fb. Such personal positions were created to protect the level of remuneration that staff were on at the time of the introduction of the new scheme.

It holds that the complainant's assimilation into the new scheme was properly conducted in compliance with the published principles and procedures. To grant him Fc6 would run counter to one of the underlying principles of the scheme, which was that it should not result in automatic promotion into a higher salary band. Promotion to salary band Fc would also imply the granting of diplomatic privileges, and would require a competitive selection involving the Senior Staff Advancement Committee. There would also have to be a proposal from the division leader concerned.

There is, moreover, no basis for his argument that he was placed on a position outside the scale. He has been classified in an official position that appears thereon. It was done as a transitional measure, necessitated by the redesign of the salary grid. He cannot claim any acquired right. He still remains eligible for promotion, and there was no discriminatory treatment against him.

D. In his rejoinder the complainant enlarges on his pleas. He contends that the Organization did not have the right to suspend his internal appeal. While he does not contest the fact that he was assimilated into the new structure according to the published principles and procedures, he disputes their actual content. The technical measures taken by CERN have an "appearance of legitimacy" but hide what he perceives as disdain towards staff members approaching retirement.

E. In its surrejoinder the Organization states that because on 20 August 2002 the Director-General took a final decision on the complainant's appeal regarding promotion to grade 12, it would normally have resumed proceedings with the appeal that had been suspended. However, because of the parallel filing of the two complaints on the same substance with the Tribunal it chose instead to await the Tribunal's ruling. Suspending his appeal, it argues, was a necessary step and the reasons were clearly explained to the complainant. The decision was made in good faith for procedural reasons.

On the merits, it reiterates that the complainant's present classification is in conformity with the salary scale and his personal position constitutes a "transitory measure"; it does not negate the opportunity for promotion.

CONSIDERATIONS

1. The facts of this case are partly set out in Judgment 2173, delivered on 3 February 2003. As a member of CERN's staff, the complainant reached the last step in grade 11 in 2000. On the one hand, he sought promotion to grade 12, the exceptional advancement grade in his career path, and on the other he requested reconsideration of the position assigned to him in the new salary scale that applied from 1 September 2001.
2. The Tribunal settled the first-mentioned claim by Judgment 2173, in which it rejected the complainant's complaint on the grounds that those responsible in his division and sector had acted lawfully within the scope of their discretion by not seeing fit to propose him for exceptional advancement, granted only to very few staff members.
3. The complainant now challenges a decision of 15 August 2001 informing him that, in view of the fact that he had been in career path VIII, grade 11, step 13, he would be assimilated into the new career structure at his existing salary level, in career path F, at salary position "p0". He filed an internal appeal against that decision on 12 October, on the grounds that it was "totally arbitrary" to place staff members who, like him, were in path VIII, grade 11, step 13, in a salary position outside the new salary scale. He maintained that this new situation infringed his acquired rights and had caused him feelings of anxiety and exclusion.
4. In a letter of 15 November 2001 the Director of Administration initially replied that steps were being taken to convene the Joint Advisory Appeals Board, but that this would take some time since the composition of the Board was still being determined. Writing again on 28 January 2002, the same Director told him that his appeal against the way he had been assimilated into the new career structure had been "suspended" pending the outcome of the one he had filed contesting his non-promotion to grade 12 of the former career path VIII, the outcome of which could affect the issue of his position in the new scale. That letter led the Tribunal to separate the two disputes, as the defendant indeed requested, and to rule in the first place, as it did in Judgment 2173, on the complainant's objection to not being promoted to grade 12 in the former path VIII.
5. In contesting the receivability of this complaint, the defendant puts forward two objections which cannot be entertained. Firstly, it submits that the complainant did not exhaust internal remedies, since the appeals procedure was suspended and no final decision had been taken. The complaint was therefore premature and hence irreceivable, especially since the Organization acknowledged receipt of his appeal within the statutory time limit and could not be accused of having implicitly decided to reject it. The Tribunal notes that the defendant, which recognised that the two appeals lodged by the complainant needed to be considered separately, expressly stated that consideration of his appeal against the way he had been assimilated into the new career structure had been suspended. There is nothing to indicate that those appeal proceedings would resume and the Organization cannot hold that the complaint is irreceivable on the grounds that the Joint Advisory Appeals Board has not issued an opinion. The complainant was therefore not at fault in bringing the matter before the Tribunal, which in these very particular circumstances must reject this first objection to receivability. Secondly, the Organization argues that the complainant submitted new pleas to the Tribunal, compared to those he had put forward in his internal appeal, by claiming that he should be graded at Fc6 level, whereas in his appeal of 12 October 2001 he had asked to be placed in the non-existent Fb13 position. In fact, the complainant's pleas, whether in the internal appeal or before the Tribunal, consist in challenging the decision taken regarding his grade and in obtaining a position in the normal salary scale at the level closest to the salary he had been receiving in the previous system. His request to be placed at a graded level within the new scale instead of one altogether outside the scale cannot properly be considered as an enlargement of the pleas he had submitted in the internal appeals proceedings, which, moreover, were not completed.
6. While the complaint is receivable, it is devoid of merit. Although the complainant objects to his new grading, he expressly admits in his rejoinder that he does not contest the fact that he was assimilated into the new career structure according to the applicable principles and procedures. It is the actual content of those principles and procedures that he objects to, particularly because their effect is to place staff holding indefinite contracts in a personal salary position outside the normal salary scale, without any real chance of promotion, which gives rise to

a discriminatory situation in relation to other staff members.

7. The Tribunal notes in this respect that the complainant's acquired rights were not disregarded, since at position Fp0 he retains exactly the same salary as on the previous scale, as well as promotion rights within the new system. The defendant argues that, in any case, the complainant could not be classified in position Fc6 as he claims, since that would have granted him an automatic promotion, which is not allowed under the new rules. Promotion to salary band Fc would also have implied the granting of diplomatic privileges, and would first have required a competitive selection procedure. The Tribunal considers this defence to be pertinent and rejects the plea based on the discrimination the complainant allegedly suffered, considering that 90 members of staff are in the same situation and that being placed in a personal salary position when career structures are being reorganised cannot be regarded in itself as unlawful. The nub of the argument in fact lies elsewhere. The complainant mainly objects to the fact that the technical measures introduced by the defendant to reorganise its career structures hide the Organization's disdain for staff members approaching retirement, and, for the sake of a small budgetary saving, generate considerable disappointment amongst staff members who deserve better. This in fact challenges the way the Organization is managed and not the legal basis for its action, which alone is subject to review by the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet