

The Administrative Tribunal,

Considering the complaint filed by Mr U.O.C. J. against the European Organization for Nuclear Research (CERN) on 25 July 2005 and corrected on 29 August, CERN's reply of 20 December 2005, the complainant's rejoinder of 6 February 2006 and the Organization's surrejoinder of 5 April 2006;

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, a Swedish national born in 1943, joined CERN in 1974 as a Laboratory Technician and was offered an indefinite contract in 1978. He worked for many years on an experiment known as ISOLDE and was promoted several times. Following the transfer of the ISOLDE facility from the Division of Experimental Physics to the Proton Synchrotron Division, he was assigned, at his own request, to the Controls Group of the latter Division as of 1 April 2000. He was detached to the Experimental Physics Division between January 2002 and December 2003, after which he joined the Accelerators and Beams Department. Since 1 September 2001 he has been in career path E.

Following the complainant's appraisal report covering 2001, his performance was rated "partially satisfactory", as a result of which his periodic salary step increase was deferred by six months, i.e. until January 2003. That decision was notified on 12 July 2002 to the complainant who wrote to the Director-General the following month requesting a review. His request for review having been rejected on 27 November 2002, he filed an internal appeal with the Director-General on 31 January 2003, asking him to take steps to restore his reputation, which, he said, had been damaged by the contested decision.

On 2 February 2004 the Joint Advisory Appeals Board, to which the matter was referred, unanimously recommended that the appeal be upheld. The Director-General decided to follow that recommendation and informed the complainant by a letter of 3 March that he had asked the Human Resources Department to implement his decision. However, he emphasised that the Board's recommendation was based mainly on procedural grounds, namely the absence of prior recorded warnings concerning his unsatisfactory performance. He also observed that the complainant must have been aware of the fact that his hierarchy was dissatisfied with his performance since several discussions had taken place between him and his superiors on that issue. He consequently encouraged him to "change [his] behaviour and show more initiative in the future".

The complainant was granted a periodic salary step increase with retroactive effect from 1 July 2002 pursuant to a contract amendment dated 12 March 2004, which he signed on 1 April, indicating that "[p]ending the decision of the Director-General to [his] request of the 2 April 2004 [he] reserve[d] [his] rights to take further actions in this case".

Indeed, by a letter of 2 April 2004 the complainant asked the Director-General to restore his reputation, to assign him to the Large Hadron Collider project and, instead of granting him his deferred step increase, to promote him to the next career path as from 1 July 2002 in compensation for the physical and moral injury he had suffered. The Director-General replied, on 11 June 2004, that the complainant did not meet the requirements laid down in Administrative Circular No. 26 (Rev. 4) entitled "Procedures Governing the Career Development of Staff Members" to be promoted to career path F. Indeed, such a promotion presupposed a change in the level of the complainant's functions, satisfactory performance in the new functions and a proposal by his hierarchy. He noted that his transfer to the Large Hadron Collider project had already become effective.

The complainant reiterated his claim in a letter dated 18 April 2005 addressed to the Human Resources Department and stated that he had suffered stress because of this ongoing case, as a result of which his health had deteriorated.

By a letter of 9 May 2005 the Head of the Human Resources Department confirmed the view expressed by the Director-General in his letter of 11 June 2004 concerning the complainant's promotion to career path F. He also stated that since the complainant's reputation had been fully restored he was in no position to grant him any further redress. That is the impugned decision.

B. The complainant contends that his reputation has been "destroyed on unfounded allegation". He points out that when he first challenged the decision to defer his salary step increase, he also asked the Administration to take the necessary measures to restore his reputation, but it failed to do so.

He argues that he has suffered defamation because the Director-General wrongly indicated in his letter of 3 March 2004 that he had met with his hierarchy to discuss his work performance. In support of his argument he points out that the Joint Advisory Appeals Board found no evidence that such discussions ever took place. He further accuses the Director-General of harassment because he encouraged him to change his behaviour, which implicitly meant that his behaviour was inappropriate; that comment damaged his honour and cast doubt on his integrity. He emphasises that the letter of 3 March was placed in his personal administrative file and was brought to the notice of members of personnel when posted on the notice board together with the Appeals Board's report.

The complainant claims 30,000 Swiss francs in moral damages for the prejudice he has suffered because of "the implementation of the delayed step", as well as 30,000 francs for "moral damage and prejudice caused by defamation and harassment by the management".

C. In its reply CERN contends that the complaint is irreceivable on three grounds. Firstly, the impugned decision of 9 May 2005 is not a final decision, but merely confirms the decision taken by the Director-General on 11 June 2004. Citing the Tribunal's case law the Organization points out that, in the absence of any new fact, a staff member cannot challenge a decision which is a mere confirmation of a final decision. Secondly, it argues that even if the letter of 9 May 2005 were to be considered as a final decision the complaint would be irreceivable for failure to exhaust internal remedies. Thirdly, it submits that since the dispute was resolved in the complainant's favour, the complainant shows no cause of action.

Subsidiarily, the Organization argues that the complaint is devoid of merit. The complainant does not allege any violation of his terms of appointment or of the provisions of the Staff Rules and Regulations. The complainant's claim for moral damages is unfounded since he was granted a periodic step increase with retroactive effect from 1 July 2002. Moreover the Organization provided him with a new working environment that he found satisfactory. CERN further submits that since it acted in compliance with the Staff Rules and Regulations, in particular Article R VI 1.20 of the Staff Regulations, the complainant is not entitled to moral damages for defamation. Regarding the allegation of harassment, it explains that the complainant should first have gone through the internal procedure set out in Administrative Circular No. 32 on "Principles and Procedures Governing Complaints of Harassment". It adds that the complainant has produced no evidence to support his allegation.

D. In his rejoinder the complainant states that he is not aware of any staff rules dealing with the "re-establishment of a destroyed reputation" and that he was therefore in no position to file an internal appeal challenging the Director-General's letter of 3 March 2004 or the Head of the Human Resources Department's letter of 9 May 2005.

On the merits, he reiterates his arguments and suggests, regarding the allegation of defamation, that the Tribunal listen to the tape recordings of the hearings held before the Joint Advisory Appeals Board; the originals are with the Organization.

E. In its surrejoinder the Organization reiterates that the complaint is irreceivable and devoid of merit. Citing the Tribunal's case law, it states that the fact that the complainant has not understood the procedure applicable to his situation does not prevent his complaint from being irreceivable. It maintains that the fact that the Director-General invited him to improve his performance does not constitute defamation or harassment but "an act of responsible human resources management".

## CONSIDERATIONS

1. The complainant challenges a decision dated 9 May 2005. The so-called "decision" merely reaffirms what

the Director-General decided on 11 June 2004, namely, not to take further action as had been requested by the complainant on 2 April 2004 to restore his reputation. The complainant claimed that his reputation had been damaged by an earlier decision, which was later rescinded, deferring a step increase.

2. Because it confirmed the decision of 11 June 2004, the letter of 9 May 2005 from the Human Resources Department did not constitute a final administrative decision and in the absence of any new fact the complainant may not challenge mere confirmation of a decision (see Judgment 1490).

If there was a final decision, it was taken on 11 June 2004 and was not timely challenged. As provided by Article R VI 1.03 of the Staff Regulations, the complainant should have lodged an internal appeal within 60 calendar days of notification of the decision, but he did not.

3. Moreover, had the letter of 9 May 2005 constituted a new decision, the proper course for the complainant was to lodge first an internal appeal; he did not do so either (see Judgment 1506). Indeed, in filing his complaint straight to the Tribunal without having lodged an internal appeal within the applicable deadlines, the complainant has failed to comply with Article VI 1.03 of the Staff Rules as well as with Article VII(1) of the Tribunal's Statute.

4. As the complaint is irreceivable, there is no need to deal with the merits of the case.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet