

**EIGHTY-THIRD SESSION**

***In re Patrizi***

**Judgment 1662**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the complaint filed by Mr. Antonio Patrizi against the European Organization for Nuclear Research (CERN) on 27 September 1996, CERN's reply of 17 January 1997, the complainant's rejoinder of 19 February and the Organization's surrejoinder of 26 March 1997;**

**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, an Italian who was born in 1938, joined the staff of CERN in 1962. He became an established member of the staff on 1 January 1965 and he resigned on 31 August 1977.**

**By a memorandum of 13 July 1976 he asked for information about his entitlements from participation in the Organization's Staff Insurance Scheme. In a letter of 30 July the Scheme told him that if he left the Organization by 31 December 1976 he would be entitled either to the repayment of his own contributions under Article 21 of the Regulations of the Scheme; or to assignment of the "transfer value" -- which was 71,000 Swiss francs -- to some other social insurance scheme in accordance with Article 16; or to a pension under Article 18, payable from 1 June 1998, the first of the month following his sixtieth birthday.**

**By a letter of 6 July 1977 the complainant asked the Scheme to pay the transfer value into his own bank account. In several conversations the officers of the Scheme explained to him that the amount might be paid only to another social insurance scheme.**

**In the ensuing correspondence he asked, among other things, for reinstatement in the Organization -- which it refused -- and for the grant of a partial disability pension because of an occupational accident that had occurred in 1969.**

**By a letter of 30 March 1979 an officer of the Scheme told him of a decision to pay him a 10 per cent disability pension as from 1 September 1977 and asked him to say what was to be done with the transfer value. In an undated letter the complainant answered that he could not yet say.**

**He did not get in touch again until 3 July 1993, when he wrote a letter to the Pension Fund, which had by then replaced the Scheme. His letter set off further correspondence about the transfer value and his retirement pension. By a letter of 4 March 1996 the Fund confirmed that he would get a deferred retirement pension but said that the assignment of the transfer value to another insurance scheme ought to have been made when he had left the Organization.**

**On 30 April 1996 he filed an appeal with the Governing Board of the Fund against the decision of 4 March. By a letter of 27 June 1996, the impugned decision, the Governing Board told him that it was offering him the following options: the repayment of his contributions, which came to 40,529 Swiss francs; the assignment of the transfer value of 71,225.60 francs to some other insurance scheme; or a deferred pension to be paid from 1 June 1998. The Board asked him to make his choice by 30 July 1996; failing that, it would take the view that he had opted once and for all for a deferred pension.**

**In a reply of 6 August to a letter which he had sent on 29 July the Fund said that since he had failed to opt**

for the repayment of his contributions or for the assignment of the transfer value his choice was irrevocably assumed to be the deferred pension.

**B.** The complainant objects to CERN's refusing to "increase the amount of the occupational benefit that had accrued to him by the date of his departure". He says that its refusal is contrary to widespread practice.

He submits that he is entitled to the payment of the transfer value. Although the "present" Rules of the Fund say that where the transfer value is not claimed within one year it shall be converted into a deferred pension, they are not binding on him because he was never sent the text. The transfer value has to be increased anyway because the Fund is now better off; otherwise it would be guilty of unjust enrichment and breach of good faith.

He contends that, contrary to what the Fund said in its letter of 6 August 1996, he did not in his letter of 29 July 1996 refrain from claiming the repayment of his contributions or the assignment of the transfer value; he merely took note of the consequences of the Fund's decision.

He expresses surprise at the Fund's allowing him only one month in which to make his choice instead of the one year provided for in its present Rules.

He asks the Tribunal to:

- declare that the Governing Board's offer of 27 June 1996 offends against Article 21 of the Agreement between Switzerland and CERN and the rules and practice of occupational and other social insurance schemes as to the enhancement of lump sums; and

- to order the Fund to pay to whichever insurance scheme he may name the amount of the transfer value, consisting of 71,255.60 Swiss francs, and interest to be reckoned at the prevailing rates as from 9 March 1979.

**C.** In its reply CERN argues that the impugned decision, which merely offered him three options, causes the complainant no injury. Besides, his complaint is irreceivable insofar as it puts forward new claims: he has not before sought the payment of interest on the transfer value.

In subsidiary argument the Organization contends that according to the Fund's consistent policy he is no longer entitled to assignment of the transfer value. That being so, he can no longer claim interest thereon either. Besides, the material rules say nothing of interest.

**D.** In his rejoinder the complainant submits that, although he took long to say what the Fund was to do with the transfer value, the reason was the Organization's own failure to tell him before he filed his internal appeal about its alleged "practice" in the matter.

He maintains that the impugned decision does cause him injury because it foists on him an unadjusted lumpsum. He is still entitled to payment of the sum since the offer he was made in 1976 was never withdrawn, indeed was put to him again in 1996.

He names the social insurance scheme to which the sum may be assigned.

**E.** In its surrejoinder the defendant accuses the complainant of bad faith in saying that he was never told about the Fund's practice. It points out that the Fund was under no strict obligation to make him the proposal in 1996,

which was an *ex gratia* offer. Naming at last a social insurance scheme to which the sum may be assigned does not revive any right to such assignment.

## CONSIDERATIONS

### *The material facts*

1. CERN recruited the complainant in 1962 as an assistant storekeeper and granted him a permanent

appointment in 1965. In 1969 he had an accident at work. On 11 June 1976 it declared him to be disabled. He considered resigning. He first wrote, however, on 13 July 1976 to the Organization's Staff Insurance Scheme, which later became the Pension Fund, to ask what amounts he might be entitled to, if he did resign, in capital transfer value or deferred pension.

2. The Scheme's answer of 30 July 1976 was that if he resigned he would be entitled either to the repayment of his own contributions or to the assignment of the transfer value -- estimated at 71,000 Swiss francs -- to some other social insurance scheme or to the payment of a pension from the first of the month following his sixtieth birthday, i.e. from 1 June 1998.

3. On 27 June 1977 he resigned as from 31 August 1977. On 6 July 1977 he told the Scheme that he wanted payment of the transfer value "so as to enhance [his] insurance against old age by buying a house". After several talks with him about his entitlements the Scheme answered on 10 January 1978 that the transfer value was payable only to some other social insurance scheme; alternatively, he might claim the payment of his contributions; and he should state his preference.

4. On 30 January 1978 the complainant wrote to the Director-General of CERN to say that the Staff Association had explained that, if he did not get the money he was entitled to, his resignation would not hold good; so he wanted the Director-General to say whether he was still on the staff. In a letter of 3 February 1978 the Leader of the Personnel Division referred him to his memorandum of 13 July 1976, to the Scheme's reply of 30 July 1976 and to the correspondence between him and the Organization; said that he had been quite aware of his entitlements from the Scheme on 27 June 1977, when he had tendered his resignation; and that, CERN having accepted it, he had not been a member of its staff since 31 August 1977.

5. On 2 March 1978 he applied for a partial disability pension. In October 1978 he applied for reinstatement on the grounds that no decision had yet been taken on his application for a disability pension or on the payment of the "repurchase or transfer value" of his entitlements. The Leader of the Personnel Division wrote to him on 18 October 1978 to say that his claim to reinstatement was dismissed and that he would be told in due course of the outcome of his application for a disability pension. As for the transfer value, he had been made an offer in the Scheme's letter of 10 January 1978 but had never answered.

6. In a letter of 30 March 1979 the Scheme told him that it would pay him a 10 per cent disability pension; as for the transfer value, it was still awaiting an answer to its letter of 10 January 1978. It sent him a new statement of the transfer value less the amount of his disability pension. He wrote to say that he was unable to answer the letter of 10 January 1978 and nonplussed at the deduction of the pension. The head of the Finance Division then explained that the two sorts of benefit were not cumulative and that the Organization was still awaiting his instructions for assignment of the transfer value.

7. Years went by without communication between the parties. At last, in a letter of 3 July 1993, the complainant wrote to ask the CERN Pension Fund how much his retirement pension would be at the age of sixty. On 2 August 1993 the Fund answered that according to the records nine-tenths of his assets had been paid to him in the form of a transfer equivalent to 71,225.60 Swiss francs. Only on 29 September 1995 did the complainant react by pointing out that he could find no trace of any such payment. He said that at the time he had been looking for a social insurance scheme to which the transfer value might be assigned. He asked the Fund to look into the matter. On 27 November 1995, the Fund wrote to say that it had found no trace of any payment and that he would therefore get a 90 per cent deferred retirement pension.

8. On 21 February 1996 he asked the Fund how much the transfer value of his pension entitlements by then amounted to. On 4 March the Fund answered that since he would be getting the deferred pension he had no right to assignment of the transfer value; indeed he had forfeited it long ago by failing to answer its offer.

9. On 30 April 1996 he filed an appeal against that decision with the Governing Board of the Fund claiming entitlement to an updated transfer value. By a decision of 27 June 1996 the Governing Board offered him the repayment of his contributions, or the assignment of the transfer value to some other insurance scheme, or the payment of a deferred pension. It gave him until 30 July 1996 to choose; if he did not, it would infer that he had opted for the deferred pension. On 29 July he told the Fund that he took note of the deadline for reply but was reserving his right to the updating or enhancement of the transfer value or to the payment of interest thereon. By a letter of 6 August 1996 the Fund told him that since he had failed to choose he would

get the deferred pension and the matter was final. But the decision he is impugning is the one of 27 June 1996.

### *Receivability*

10. The Organization submits that on two grounds his complaint is irreceivable.

11. Its first plea is that the impugned decision causes him no injury. He was offered assignment of the transfer value at the same time as the other two options and by failing to choose in time he tacitly consented to payment of the deferred pension.

12. The plea fails. When the decision of 4 March 1996 granted him the deferred pension he appealed to the Governing Board of the Fund claiming what he called the "updating" of the transfer value. And in acknowledging the Board's exceptional offer of 27 June 1996 to pay him that value he said he was "reserving" the right to claim the updating or enhancement of the sum or the payment of interest thereon. The Fund's letter of 6 August 1996 confirming the terms of its Governing Board's decision was an obvious rejection of that "reservation". Since on that account alone the impugned decision caused him injury his complaint is receivable.

13. The Organization's second plea is about his claim to the payment of interest on the transfer value at the prevailing rates as from 9 March 1979. It argues that he never made any such claim before filing his complaint.

14. Again the plea fails on the evidence. Although before appealing to the Governing Board of the Fund the complainant spoke only of "updating" the transfer value his response to the decision of 27 June 1996 was more explicit: he claimed not just the updating and enhancement of the sum but also interest thereon. Moreover, he explained in his letter of 29 July 1996 what he meant by "the present figure of the transfer value", the term he had used in the second point (b) of his letter of 30 April 1996 to the Board: "the transfer value plus interest". The conclusion is that, although before filing this complaint he had not formally claimed the payment of interest at the prevailing rates on the transfer value, he did so in his correspondence with the Fund.

### *The merits*

15. So the material issue is whether the impugned decision of 27 June 1996 should be quashed. It is common ground that the complainant was offered the three options stated by the Fund. The decision gave him that choice or renewed it: he was to be granted certain benefits - in the amounts stated - in three contingencies. Its terms are indeed a plain offer from the Board of three distinct options to choose from.

16. The Fund had to set a deadline for his choice so that it could determine his entitlements. He objects that the time was too short. In view, however, of the great lapse of time since he had left the Organization, it was only reasonable to allow him just a short deadline. Besides, he never applied for more time.

17. The terms of the options offered to him were also in line with the material rules. The option of withdrawing his own contributions arose under the old rules -- Article 43 of the 1967 Regulations and Article III 1.02 of the 1986 Rules -- but was plainly of no interest to him. Article II 1.13 of the 1986 Rules reads:

"Where the member has ten or more years of service, he shall have the choice between a deferred retirement pension, and payment into a national Social Security pension scheme, and/or into a private insurance scheme offering comparable guarantees."

That is just what the impugned decision offered to the complainant.

18. The complainant says that the benefit is less than what he asked for should he choose assignment to some other social insurance scheme. What he wanted was the "updating" of the amount as from the date of his leaving CERN, for example by the payment of interest. The impugned decision does not grant him that but offers instead only the original figure of the transfer value. What that means is clear in the light of the claim that he put to the Fund and of comparison with the first option, which did include interest. The Organization has indeed confirmed as much in its pleadings to the Tribunal.

19. The complainant submits that the refusal of interest runs counter to the widespread practice of social insurance schemes, to the legislation of the host countries of CERN, and to Article 21 of the Agreement concluded between Switzerland and CERN. It would, too, unjustly enrich the Fund to the participant's detriment. The Organization replies that there is no such practice. It says that it is bound only by the provisions of the Fund's rules, which do not prescribe the payment of interest on the transfer value. Its consistent practice is indeed not to pay interest thereon, and it asks the participant to choose quickly so that there will be no risk of serious loss.

20. The complainant's claim draws some support from Section 2(3) of the Swiss Federal Act on Unrestricted Transfer (RS 831.52). But the Act does not apply to the CERN Pension Fund and neither may any such obligation be inferred from Article 21 of the Agreement between Switzerland and CERN, which allows merely the possibility of "affiliation to Swiss insurance schemes for those of its staff members who are not covered by equivalent social insurance by the Organisation itself". Moreover, the complainant has not adduced any proof of his contention. The conclusion on the evidence must be that there is no general rule requiring the Fund to pay interest on the transfer value. So the Fund was free to rely on the text of its own Rules, which do not expressly provide for interest, and on consistent practice. The refusal of interest also draws support from the fact that the transfer value will ordinarily be assigned quite promptly so that the participant suffers no serious injury.

21. In the light of the foregoing the impugned decision shows no flaw and the challenge to the decision of 27 June 1996 must therefore fail. Any decision taken by the Organization in accordance with that decision is likewise beyond challenge.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

*(Signed)*

Mella Carroll  
E. Razafindralambo  
Egli  
A.B. Gardner