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

NINETY-FOURTH SESSION

Judgment No. 2182

The Administrative Tribunal,

Considering the complaints filed by Mrs S. D.-C., Mrs A. L. M. F., Mrs M. L.-V. O. and Mr U. L. against the European Organization for Nuclear Research (CERN) on 27 September 2001 and corrected on 21 December 2001, CERN's reply of 9 April 2002, the complainants' 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 none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. CERN recruited the complainants at various dates in 1975 and 1976 as language teachers with the status of "paid associates", initially on one-year renewable appointments. As such, they were not able to contribute to the CERN Pension Fund. Under the terms of their contracts, they were exempt from the 7 per cent deduction made from salaries of staff members, by way of contributions to the Fund. They also received a 7 per cent monthly salary supplement as "compensation for retirement insurance". They thus had an amount equal to 14 per cent of their basic salary with which to pay for voluntary membership of a retirement pension scheme.

Having extended their contracts several times, on 1 November 1986 CERN changed their status to that of staff members and gave them renewable three-year appointments. They accordingly became members of the Pension Fund. They got indefinite appointments at various dates between 1992 and 1996.

By letters of 4 July 2000 they asked the Director-General to grant them retroactive membership of the Fund for the period when they had the status of paid associates. In a reply of 31 August the Director of Administration refused their request on the Director-General's behalf.

On 20 October 2000 the complainants appealed against that decision. Their cases went to the Joint Advisory Appeals Board. On 14 May 2001, in answer to a query from the Chairman of the Board, the Administrator of the Pension Fund submitted a table showing, for each of the complainants, the cost of purchasing full pension entitlements in the Fund for the period up to November 1986. In its report of 22 May 2001 the Board concluded that:

"• The requirements for a contract as paid associate were not met in the case of language teachers [...]. This is particularly serious in view of the periods claimed.

• CERN has fulfilled in part its social security obligations as employer.

We therefore recommend changing the dates of the claimants' membership of the CERN Pension Fund by exceptional purchase. We recommend that CERN pay one third of the amounts indicated in the Fund Administrator's letter of 14 May 2001. The payment must enable the dates of their entry into the Fund to be brought forward to cover one third of the period in question. The new membership dates may be brought forward further by contributions from the claimants of up to two thirds of the amounts indicated in the Fund Administrator's letter of 14 May 2001."

By letters of 2 July 2001 - the impugned decisions - the Director of Administration informed the complainants that, acting on the Director-General's behalf, he had endorsed the Board's recommendation. By letters of 6 August the Leader of the Human Resources Division told the complainants that CERN had paid into the Pension Fund an amount "corresponding to the purchase, on an exceptional basis, of the one third of the contributions which it had neither paid nor compensated them for" during the period in question.

B. On receivability, the complainants point out that they never lost hope that CERN would ultimately establish them as staff members; that though they constantly protested at their contractual position, for fear of losing their jobs they put off challenging it until they got indefinite appointments; that even then, it took some time to muster the resolve to act; and lastly, that CERN decided not to object to the receivability of their internal appeals.

On the merits, they point out that they did not meet one of the criteria for being placed on paid associate status: they had no national employer guaranteeing them social cover in their countries of origin. The only issue therefore is whether CERN compensated them fairly. Citing figures, they submit that the total amount it paid them to allow them to contribute to an outside pension scheme (which none of them was able to do) was insufficient considering the cost of purchasing full pension rights in the CERN Pension Fund. What is more, CERN acknowledged that the situation was irregular. In the complainants' submission, the award of paid associate status was merely a device to deny them the protection afforded by the Staff Rules and Regulations without forfeiting the benefit of their services.

Their main plea is that CERN is in total breach of the social security obligations incumbent on it as an employer. If none of the language teachers joined an outside pension scheme, it was not because they were unconcerned about their future but because they genuinely lacked the means. In any event, it was not enough for CERN to assume that they could afford membership of a pension scheme with the extra 14 per cent of base salary it paid them every month. As their employer, it had a duty to check that they actually joined such a scheme. It failed to do so and thus neglected the fundamental duty of protection and care it owes to all who serve in the Organization.

In subsidiary argument the complainants observe that by purchasing just one third of their pension entitlements CERN has compensated them only very partially for the injury they actually sustained. Furthermore, the cost of purchasing the remaining two thirds is exorbitant in the light of the 14 per cent supplement they received each month before joining the Fund. In their view, they are therefore entitled at the very least to payment by CERN of the equivalent of two thirds of the amounts indicated in the letter of 14 May 2001. Anything less would fall seriously short of fair compensation.

They ask the Tribunal to quash the decisions of 2 July 2001 and to grant full redress in law, namely: to order CERN to purchase in full their pension entitlements for the period prior to their joining the Fund, subject to their reimbursing the supplements they received during that period; or else to order the Organization to purchase the two thirds of their pension entitlements for that period. They also claim costs.

C. In its reply CERN rebuts the complainants' arguments on receivability. Since they filed their complaints more than twenty-five years after joining CERN and more than fifteen years after becoming established staff members, it asks the Tribunal to declare them irreceivable.

It further submits that the complaints are devoid of merit. Having signed contracts as paid associates without entering any reservations, and having failed while they were paid associates to apply for membership of the CERN Pension Fund, the complainants have forfeited any claims they might have made in connection with that status.

CERN points out that when the complainants joined the Organization, the status of established member of the personnel was reserved for staff members appointed to established posts, of which there were a fixed number authorised by the Council and formally defined and classified by the Director-General prior to recruitment. Paid associates, on the other hand, were for the most part hired for research and received at least half their salary from CERN. Their posts were not defined or classified by the Director-General prior to recruitment. The complainants' job - language teaching - did not meet the criteria for the creation of an established post. And while it may be unusual to appoint as a paid associate someone not engaged in scientific work, the grant of such status to the complainants was not in breach of the Staff Rules and Regulations.

CERN argues that in comparing the amounts it paid them to join a pension scheme and the cost of purchasing full

membership of the CERN Pension Fund the complainants have drawn a conclusion which is blatantly misleading because they omitted to work out what those amounts would be worth today. Based on their actuarial value they would very largely have enabled the complainants to buy entitlements in the Pension Fund.

The Organization considers that it has "amply fulfilled" its obligations to the complainants. With the extra amount allowed in their salaries, their pay was considerably higher than that of established staff members in positions with the same level of responsibility. Besides, according to the results of a study carried out by the Organization, to join a national pension scheme cost considerably less than what they were paid in compensation.

It points out that in an attempt at conciliation it decided to accept the Board's recommendation and paid into the Pension Fund, for the period prior to the complainants' establishment as staff members, an amount equal to one third of the contributions required. Consequently, the amounts they have received (14 per cent plus 7 per cent) are much the same as what CERN pays into the Fund on behalf of established members of staff.

CERN sees the complainants' main claim as inconsistent: it seeks application of a "double standard" to the exclusive and obviously unjustified advantage of the complainants. As to their subsidiary claim, it ought to have been accompanied by an offer to reimburse what the Organization paid them in compensation. CERN specifies the amounts it deems the Tribunal ought to set should it allow one or other of their claims.

D. In their rejoinder the complainants submit that, by acceding to their claims in part, CERN has acknowledged that their internal appeals were well founded and hence receivable.

They point out that what they are claiming is to have their paid associate contracts redesignated fixed-term contracts of established staff members. They refute CERN's allegation that language teaching did not meet the criteria for creating an established post: why, then, were they established as staff members in 1986 when their duties remained the same? They were not given established posts earlier because CERN failed to authorise and classify them, not because language teaching fell short of the criteria for creating established posts.

They rebut CERN's objection that they overlooked the current worth of the compensation and reject the value proposed by CERN. They consider unacceptable CERN's calculation of the current value of the amounts they would have to reimburse. They explain that they made no offer of reimbursement in their subsidiary claim because repayment would be "tantamount to depriving them of all their savings".

E. In its surrejoinder CERN denies having withdrawn its objections to the receivability of the complainants' claims.

It points out that, in the absence of any evidence that the complainants took steps to join pension schemes, it can only conclude that they made no attempt to do so.

According to CERN, not until June 1986 did it decide to make language teaching a permanent activity. That decision led to the creation of established posts for the complainants. Before then they had had no real career prospects in the Organization and to make them permanent members of staff would have been irresponsible in terms of recruitment policy.

Most paid associates at CERN, it is true, are employed by scientific institutes, and the complainants were exceptions in that regard. However, membership of an outside pension body was not compulsory under the rules in force when the complainants joined CERN.

Lastly, having to account to the Member States for the funds they contribute to its activities CERN must use them responsibly, and in this case it is bound to ensure that proper indexation is applied.

CONSIDERATIONS

1. The complainants were recruited by CERN at various dates in 1975 and 1976 as paid associates to teach languages on a part-time basis. Their status barred them from membership of the Organization's Pension Fund, which they joined only on becoming established staff members, on 1 November 1986. Before that date they paid no contributions to the Fund towards retirement, and CERN accordingly did not deduct from their salaries the 7 per cent that established staff members contribute to their pension entitlements. They also got a salary supplement

equal to 7 per cent of their basic pay by way of "compensation for retirement insurance".

2. By letters of 4 July 2000 the complainants asked the Director-General to take the necessary steps to secure their membership of the Pension Fund with retroactive effect to cover the period up to 1 November 1986. The Director of Administration replied on 31 August 2000 that as paid associates they were not eligible for membership of the Fund. He pointed out that CERN had paid them twofold compensation, amounting to 14 per cent of their basic monthly salary, to finance voluntary membership of a retirement pension scheme. Unhappy with that reply they filed appeals on 20 October 2000 with the Director-General, which were referred to the Joint Advisory Appeals Board. They argued that their status of paid associate offended against the rules because they were not on secondment from an institute, laboratory or university; that CERN was their sole employer; that CERN had wrongly made them bear the entire cost of obtaining retirement protection; and that the amount allowed to them for that purpose was not sufficient to compensate them for the drop in income that would have ensued.

3. After two sessions of hearings the Board reported on 22 May 2001. In its recommendation it observed that paid associate was not the appropriate status for language teachers and that CERN knew full well that it was wrong to have attributed it to the complainants. It noted that until 1986, for established officials, contributions to the Pension Fund amounted to 21 per cent of their salaries, 7 per cent being paid in by the staff member and 14 per cent by the Organization, and that by awarding the complainants a pay supplement of 14 per cent CERN had fulfilled its obligations in part. The complainants therefore had no grounds for asserting that CERN had made them assume the entire cost of the insurance. In conclusion, the Board recommended changing the dates of the complainants' membership of the Pension Fund through the purchase, on an exceptional basis, of one third of the amounts that ought to have been paid in during the period in question. It added:

"The payment must enable the dates of their entry into the Fund to be brought forward to cover one third of the period in question. The new membership dates may be brought forward further by contributions from the claimants of up to two thirds of the amounts indicated in the Fund Administrator's letter of 14 May 2001."

4. By decisions of 2 July 2001 the Director of Administration informed the complainants that, acting on the Director-General's behalf, he was following the Board's recommendation and that, exceptionally, CERN would bear the cost of the purchase, to be made under Article V 4c. or d. of the Pension Fund Regulations. On 6 August 2001 the Leader of the Human Resources Division informed the complainants that CERN had made a "payment to the Fund corresponding to the purchase, on an exceptional basis, of one third of the contributions which it had neither paid nor compensated them for" during their period as paid associates.

5. In complaints of 27 September 2001, which the Tribunal will join, the complainants seek both the quashing of the decisions of 2 July 2001 insofar as they do not meet in full their claims to the purchase with retroactive effect of all the contributions they consider due for the period during which they were employed as paid associates, and all redress in law. They accordingly ask the Tribunal to order CERN to purchase in full their pension entitlements for that period, subject to their reimbursing the amounts it paid them at the time to finance membership of a scheme. In a claim which is purely subsidiary they state that, in their view, as compensation they are entitled at the very least to purchase by the Organization of the equivalent of two thirds of their pension rights.

6. The complainants argue that CERN kept them in an irregular situation for more than ten years. They ought not to have been recruited as paid associates and denied the pension entitlements due to CERN officials. In allowing that CERN disregarded the social security obligations incumbent on it as an employer. Furthermore, what the Joint Advisory Appeals Board recommended did not amount to proper redress for the injury CERN caused by its failings.

7. In rebuttal CERN first objects to receivability: the complainants may not call into question contracts which they entered into advisedly and held until the decision was taken in 1986 to award them contracts as established staff members. According to CERN, "the complainants having submitted their complaints to the Administrative Tribunal more than twenty-five years after joining CERN and having been established staff members for more than fifteen years", their complaints are irreceivable. The complainants for their part plead bad faith: during the internal appeal procedure CERN raised no objection to receivability and argued the case on the merits. It also agreed to meet their requests in part.

8. In the internal appeal, as here, the Administration argued that having signed their contracts as paid associates "without entering any reservations" and having raised no timely objection to their terms within the time limits, they

have forfeited their right to challenge them. The only issue therefore is whether the time that has elapsed since the complainants were given the status of paid associates is an obstacle to the receivability of their appeals of 2000.

9. In resolving this issue a distinction needs to be drawn in the complainants' submissions between, on the one hand, the pleas that address the lawfulness of their status until 1986 and the conditions in which they thereafter were granted fixed-term, then indefinite, contracts and, on the other, those which specifically address the retroactive payment of the contributions due to the Pension Fund. CERN is right in its assertion that certainty of existing and undisputed legal relationships, bars the complainants from challenging twenty-five years after joining the Organization contracts which they entered into advisedly. The case law, particularly Judgment 1034 delivered on 26 June 1990, confirms this, contrary to the complainants' assertion (see also Judgment 1938 delivered on 3 February 2000). Consequently, notwithstanding the complainants' pleas that one of them was subjected to pressure to dissuade him from seeking a fixed-term appointment and that they feared losing their jobs if they challenged the status they held prior to 1986, the Tribunal may not review that contractual status though it was doubtless improper.

10. Nevertheless, by agreeing to reconsider the complainants' entitlement to retroactive membership of the Fund for the period in question - though it did so voluntarily as a gesture of conciliation and not out of any legal obligation - CERN did acknowledge that it needed to remedy a situation which the Joint Advisory Appeals Board had found to be unfair. Consequently, whether or not the complainants may challenge the lawfulness of their contracts as paid associates, their contention that the impugned decisions afford insufficient redress for the unfair treatment they suffered is receivable.

11. The complainants object that CERN failed to afford them the safeguards it owes its staff and did not ask them whether they had been able to join outside pension schemes. In their submission, the fairest way of compensating them for the injury it caused by that attitude would be to require CERN to purchase not one third, but full pension rights for the period in question, even if that meant they had to repay the compensation they received during that period. The Organization observes that in reckoning the amounts to be repaid which, as the complainants acknowledge, should be adjusted for inflation, account should be taken of the Swiss rate of interest on three-month deposits.

Had the complainants held some other contractual status and if a fictitious calculation of their pension rights had become necessary, the current value of the amounts due from the Organization and those to be repaid by the complainants would undoubtedly have to be established. In the Tribunal's view, however, the solution recommended by the Board, which CERN adopted, is more equitable since, as already stated, for the entire period during which they paid no contributions to the Pension Fund the complainants' salaries were supplemented by 14 per cent. During that same period, established members of staff paid 7 per cent of their salaries into the Pension Fund which CERN supplemented by a further 14 per cent. By paying, as it has agreed to, the 7 per cent it would otherwise have had to pay during the period in question, CERN will re-establish the employee/employer ratio of contributions which it failed to apply before 1986. From the evidence on file it cannot be gauged with any certainty how far, at the time, a contribution rate of 21 per cent would have enabled the complainants to secure decent cover for old age. But they fail to show that they took timely steps to do so. Having had the benefit of a salary supplement of 14 per cent which should have gone towards such cover, they may not now object to the fact that CERN has set the compensation it accepts to pay at 7 per cent of their salary, in other words the percentage it ought to have paid into the Fund at the time. They are being offered the opportunity to benefit from the purchase of the periods during which they were not members of the Fund and it is not unfair that they themselves should pay a percentage of the basic salary they earned at the time equivalent to the supplement that CERN granted them undoubtedly with the sole intent of enabling them to take out insurance against the risks of old age.

12. The conclusion is that their main claims must fail and it applies, *mutatis mutandis*, to their subsidiary claims and their claims to costs.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.