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

NINETY-FOURTH SESSION

Judgment No. 2205

The Administrative Tribunal,

Considering the complaint filed by Mr J. H. F. J. L. against the European Organization for Nuclear Research (CERN) on 6 July 2001 and corrected on 2 October 2001, CERN's reply of 14 January 2002, the complainant's rejoinder of 17 April and the Organization's surrejoinder of 24 June 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 was born in 1965 and has Belgian nationality. He joined CERN on 1 June 1992 as a technical engineer in electronics under a contract of limited duration, for a three-year term, which entitled him to a non-resident allowance amounting to 9 per cent of his base salary. In 1994 he applied for a similar post. He was selected for the post and with effect from 1 June 1995 CERN granted him a further contract, again of limited duration for a three-year term, likewise entitling him to a non-resident allowance of 9 per cent. Following the complainant's marriage, the Organization granted him a family allowance with effect from 1 August 1996, as a result of which the rate of his non-resident allowance rose to 12 per cent.

At CERN, a study of "staff members' financial conditions" is carried out every five years. In the course of the study of the financial conditions applicable as of 1 January 1996, certain issues prompted in-depth discussions by the Restricted Tripartite Group. In its report of 13 December 1995, the Group proposed, inter alia, a gradual reduction of the non-resident allowance from 12 to 6 per cent for "newly-recruited" staff members, to be achieved by annual reductions of 0.5 per cent with effect from the starting date of an indefinite contract. On 15 December the Council of CERN adopted this proposal. The Director-General informed all staff members of this by a letter of the same date, the terms of which were reiterated in the CERN Bulletin of 18 December 1995. In December 1997 the Organization published Administrative Circular No. 31, which stated that the reduction of the non-resident allowance did not apply to staff members who had been granted an indefinite contract prior to 1 January 1996, nor to those who had obtained an indefinite contract after 31 December 1995 but who had been employed under a fixed-term contract prior to that date. This circular also amended part of Annex R A 5 of the Staff Regulations. The new Article R A 5.03 provided as follows:

"The following conditions shall apply to the non-resident allowance of staff members, commencing from the time of award of an indefinite contract, until the non-resident allowance reaches the minimum value given in paragraph c) below:

a) For recipients of the family allowance, the non-resident allowance [...] shall be reduced each year by 0.5 percentage points.

[...]

c) In no event shall the amount of the non-resident allowance be lower than 6% [...] of the basic salary of the staff member concerned [...]."

On 20 March 1998 the complainant applied for a post similar to his own. Having been selected, he obtained a

three-year fixed-term contract which began on 1 June 1998. On 15 June 1999 the Director of Administration wrote to inform him that he was to be granted an indefinite contract. This decision took effect on 1 July 1999. The amendment to his contract, which was drafted on 21 June, stipulated that his non-resident allowance would be subject to the conditions of application defined in Article R A 5.03. When he received his pay slip for July 2000, the complainant noticed that the allowance in question had been reduced from 12 to 11.5 per cent of his monthly base salary.

On 20 September 2000 he submitted an internal appeal to the Director-General. The matter was referred to the Joint Advisory Appeals Board, which recommended, in its report of 21 March 2001, that the appeal be rejected. By a letter of 11 April 2001, which constitutes the impugned decision, the Director of Administration informed the complainant that the Director-General had decided to dismiss his appeal on the grounds that it was time-barred and subsidiarily because it was unfounded.

B. The complainant asserts that his complaint is receivable. In accordance with Article R VI 1.03 of the Staff Regulations, his internal appeal was filed within sixty days of the notification of the decision he challenged, namely his pay slip for July 2000. He considers that the Organization's argument that he ought to have appealed the decision of 21 June 1999 is contrary to the principle of good faith: since the amendment to his contract did not refer to Administrative Circular No. 31, he had serious reasons to believe that the reduction of the non-resident allowance did not concern him. Furthermore, the Council's decision of 15 December 1995, the Director-General's letter of the same date and the Bulletin of 18 December 1995 all indicated that the said reduction applied only to newly-recruited staff members, leading established staff members to believe that they were not concerned.

On the merits, the complainant submits that there is a mistake of law. He considers that the decision to apply the reduction in non-resident allowance to him did not implement the decision of 15 December 1995, which applied the reduction to staff members "to be recruited in future", i.e. after 31 December 1995. Indeed, on that date he was already a CERN staff member, having been employed by the Organization continuously since 1 June 1992 under successive contracts which, in his view, were merely renewals of one same contract. Moreover, unlike the decision of 15 December, Administrative Circular No. 31 drew a distinction between staff members based on their contracts. Consequently, he describes the circular as illegal insofar as it was not confined to indicating the conditions of application of the Staff Regulations.

Relying on the Tribunal's case law, the complainant alleges that the impugned decision breached his acquired right to receive the full non-resident allowance.

Lastly, he considers that the system of gradually reducing the allowance adversely affects an essential component of his remuneration without justification. The allowance in question is intended, firstly, to enable the Organization to recruit staff of the highest standard on the basis of a geographical distribution which is as fair as possible, and secondly, to enable staff members to maintain links with their country of origin. Consequently, CERN could not reduce the level of this allowance without valid reasons.

The complainant asks the Tribunal to annul the impugned decision and to draw all legal consequences of such annulment. His principal claim is for payment of the full non-resident allowance and reimbursement of the amounts not paid as a result of the application of the reduction from July 2000 onwards. As a subsidiary claim, he seeks the payment of the transfer value of his pension rights as at 30 June 1999, in accordance with Article II 1.12 of the Rules of the CERN Pension Fund. He also claims costs.

C. In its reply the Organization raises an objection to receivability on the grounds that the complainant has failed to exhaust the internal remedies. The complainant ought to have appealed against the decisions of 15 or 21 June 1999, but on the contrary he signed the amendment to his contract without expressing the slightest reservation. CERN considers that the complainant was aware of the implications of obtaining an indefinite contract. They are described in a document dated 1 January 1998 which the Organization had sent to him when he applied in March 1998. Furthermore, Administrative Circular No. 31, of which each staff member is deemed to be aware, was published in December 1997. It indicated that the allowance reduction mechanism applied to his case. CERN adds that the complainant's subsidiary claim is new and hence irreceivable.

The Organization submits that the contract it entered into with the complainant on 1 June 1998 was the result of a new recruitment procedure initiated long after the Council's decision of 15 December 1995. The reduction in non-resident allowance for staff members recruited after 1 January 1996 is therefore clearly applicable to him. CERN

considers that Administrative Circular No. 31 merely clarifies the above-mentioned Council decision and that the complainant was employed not under a single contract but under a series of separate contracts. However, since there was no break in his membership of the Pension Fund, he is not entitled to the payment of a transfer value.

The defendant also considers that no breach of the complainant's acquired rights has occurred, since the decision to reduce the non-resident allowance came into force before he was recruited under his current contract. In his case, the reduction in the allowance results from the terms of his new contract, which he signed in full knowledge of the facts. Consequently, there has been no unjustified change in his remuneration.

D. In his rejoinder the complainant maintains that his complaint is receivable. He argues that his subsidiary claim is not a new claim, but a "mere clarification".

He emphasises that since 1992 he has performed the same duties and has been granted step increases based on the number of years of service in his post: thus, there was clearly no new recruitment process. He considers that the Organization has not disputed his assertion that he has an acquired right to receive the full non-resident allowance.

E. In its surrejoinder CERN reiterates its objection to receivability. It states that it informed the complainant expressly and by various means, including in the amendment to his contract, of the reduction in his non-resident allowance. It fails to see how a claim concerning pension rights, which has never been submitted previously, can amount to mere clarification of a claim for payment of the full non-resident allowance. On the merits, it refers to the arguments put forward in its reply.

CONSIDERATIONS

1. On 15 December 1995 the Council of CERN adopted a proposal to reduce the non-resident allowance for staff members "to be recruited in future". Staff members were informed of this in a letter of that same date from the Director-General, the terms of which were reiterated in the CERN Bulletin of 18 December 1995 and in an information document entitled "Main new features of the Staff Rules and Regulations", which was presented to the staff at the beginning of 1996. The latter document contained the following statement:

"For newly-recruited staff members who do not already have a fixed-term or indefinite contract, the non-resident allowance shall be reduced gradually, with effect from the granting of an indefinite contract, until its initial percentage has been reduced by half over a period of 12 years, as set forth in Annex R A 5."

The new Article R A 5.03 of the Staff Regulations is cited under A, above.

2. By a letter of 10 October 1997 the complainant was reminded that his contract of limited duration was due to expire on 31 May 1998.

On 20 March 1998 the complainant applied for a post similar to his own. He was selected and was offered a three-year fixed-term contract with effect from 1 June 1998. This contract, which was classed as a long-term contract, could be converted into an indefinite contract in accordance with Article R II 1.19 of the Staff Regulations and Administrative Circular No. 9. To that end, the contract stipulated as follows:

"This fixed-term contract is offered for a duration of 3 years. It may be renewed or extended up to a maximum total period of 6 years. A fixed-term contract may lead to the award of an indefinite contract."

By a letter of 15 June 1999 the complainant was informed of a decision to grant him an indefinite contract with effect from 1 July 1999. The amendment to his contract, which was drafted on 21 June and signed by the complainant on 11 August 1999, stipulated, inter alia, that his non-resident allowance was "subject to the conditions of application defined in Article R A 5.03 of the Staff Regulations", and that the "annual reduction in non-resident allowance [was] not covered by an amendment to the contract". The amendment also stipulated that the complainant had to notify the Organization of any disagreement with the terms of the amendment within sixty days of receipt.

3. When on 24 July 2000 the complainant received his pay slip for July 2000, he noticed that his non-resident allowance had fallen from 12 to 11.5 per cent of his base salary.

On 20 September 2000 he submitted an internal appeal to the Director-General. The matter was referred to the Joint Advisory Appeals Board, which issued a report on 21 March 2001 recommending that the appeal be dismissed. By a letter of 11 April 2001 the complainant was informed that the Director-General had decided to dismiss his appeal on the grounds that it was time-barred, and subsidiarily because it was unfounded. That is the impugned decision.

4. The complainant's principal and subsidiary claims are listed under B, above.

In support of his complaint, the complainant asserts that the impugned decision was illegal because it was tainted by an error of law and disregarded his acquired rights, and because the system of gradually reducing the non-resident allowance adversely affects an essential component of his remuneration without justification.

5. The Organization argues, primarily, that the complaint is irreceivable, and subsidiarily that it is unfounded. On the issue of receivability, the Organization considers that the complainant has failed to exhaust all the internal remedies available to him. It submits that the reduction of the complainant's non-resident allowance resulted from the decision of 15 June 1999 granting him an indefinite contract, and from the contractual amendment of 21 June 1999. The complainant ought to have appealed against these two decisions within the stipulated deadlines, but he failed to do so. Regarding the complainant's subsidiary claim, the CERN points out that since it is a new claim it is irreceivable.

6. The complainant considers that the Organization cannot argue in good faith that his appeal is time-barred. He asserts that there was never any doubt as to his intention to challenge any reduction in his non-resident allowance, and that the Organization was aware of this. Under those circumstances, the Organization ought to have made its position clear to the complainant to enable him to exercise his right of appeal without the risk of facing an objection to receivability.

Regarding his subsidiary claim, the complainant observes that it is not a new claim but a "mere clarification".

7. The Tribunal considers that CERN's objection to receivability is valid, because the complainant lodged his internal complaint on receiving his pay slip for July 2000, which was the first individual decision applying the reduction in non-resident allowance, whereas he ought to have challenged the terms of the contractual amendment of 21 June 1999.

Consistent rulings by the Tribunal make it plain that the act which is challengeable and so sets off the time limit will ordinarily be some individual decision notified to the staff member. Only that decision affords him unquestionable and final notice that the time limit is set off and that he will have to act if he wishes to assert his rights (see, in particular, Judgment 1393, under 8, and the cases cited therein).

In the present case, the amendment of 21 June 1999 had all the attributes of a challengeable individual decision: it referred to the statutory provisions that were to apply from that point onwards, regarding the non-resident allowance, and expressly provided that the annual reduction of that allowance would not be announced by a contract amendment. Taking into account all the information that was provided concerning the modifications approved by the CERN Council concerning the non-resident allowance, the complainant could not have been unaware that the reference, in the amendment to his contract, to that allowance and to the reduction conditions defined in Article R A 5.03 of the Staff Regulations would necessarily result in an annual reduction of his non-resident allowance one year after the granting of his indefinite contract, as indicated in Administrative Circular No. 31, which was published in December 1997.

Consequently, the complainant had no reason to wait for the actual application, one year later, of the reduction of his non-resident allowance before filing an internal appeal.

Article R VI 1.03 of the Staff Regulations provides, inter alia, that the "internal appeal shall be lodged within 60 calendar days of notification of the challenged decision". Thus, the complainant's internal appeal, which was filed on 20 September 2000 whereas the contractual amendment had been drafted on 21 June 1999, was time-barred.

Contrary to the complainant's assertion, the information given to him by the Organization was clear and no further details were necessary. Consequently, the Organization did not breach the principle of good faith.

8. In view of the foregoing considerations, the internal appeal was irreceivable and the present complaint must therefore be dismissed.

9. The complainant's subsidiary claim for payment of the "transfer value of his pension rights" is entirely unrelated to the impugned decision. Since the internal remedies have not been exhausted, this claim is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 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.