

The Administrative Tribunal,

Considering the complaint filed by Mr A. S. against the European Organization for Nuclear Research (CERN) on 11 July 2005 and corrected on 1 September, the Organization's reply of 11 November 2005, the complainant's rejoinder of 14 February 2006 and CERN's surrejoinder of 23 May 2006;

Considering Article II, paragraph 5, 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. Article II 1.15 of the Rules of the Pension Fund of the European Organization for Nuclear Research deals with the adjustment of pensions and reads as follows:

“The CERN Council shall decide annually the adjustment to be made to pensions (except that for unsuitability), to fixed benefits and to allowances. For this purpose, it shall take particular account of the criteria adopted for the adjustment of salaries.”

The complainant, an Italian national born in 1935, worked at CERN from 15 March 1965 to 25 April 1969, then from 1 May 1970 to 31 December 2000. He retired on 1 January 2001 and has since been drawing a retirement pension from the CERN Pension Fund.

In 2004 CERN commissioned an actuarial review of the Fund as at 1 January 2004. The report submitted by the actuaries on 22 July 2004 revealed that the Fund had an updated technical deficit of 254 million Swiss francs. On the basis of this report, at the beginning of October 2004 the Governing Board of the Pension Fund decided to recommend that the CERN Council should adjust pensions, fixed benefits and allowances by 0 per cent with effect from 1 January 2005. After the Standing Concertation Committee had discussed this issue, the Director-General invited the Finance Committee also to recommend that the Council should make an adjustment of 0 per cent effective 1 January 2005.

The issue was then debated in the Tripartite Employment Conditions Forum (TREF). On that occasion the Staff Association announced that it did not support the position adopted by the Management of the Organization. On the other hand, most of the representatives of the Member States were in favour of the proposal to adjust pensions by 0 per cent. On 3 November 2004 the Finance Committee recommended that the Council should approve such an adjustment. On 17 December the Council decided to approve a 0 per cent adjustment of pensions, fixed benefits and allowances for 2005, “on the understanding that the whole situation of the Pension Fund would be re-considered as early as possible in 2005 and a comprehensive package of measures submitted to [it] relating to all parties to the Pension Fund, namely the active staff, the beneficiaries and the Organization in order to improve the capacity of the Fund to meet its long-term liabilities”. In a letter of the same day, the Administrator of the Pension Fund informed its beneficiaries, including the complainant, of the decision thus adopted and explained that it was an initial protective measure to address the deterioration in the Fund's financial situation. He added that several studies “to define a package of measures to restore the actuarial balance of the Fund” were under way.

On 11 February 2005 the complainant sent the Chairman of the Governing Board of the CERN Pension Fund a letter in which he appealed against the decision not to adjust his pension on 1 January 2005. In a letter of 12 April 2005, which constitutes the impugned decision, the Chairman of the Governing Board informed the complainant that he authorised him to refer the matter directly to the Tribunal. The complainant filed his complaint on 11 July 2005.

B. The complainant has four pleas. Firstly, the principle of “the employer's social responsibility” has been

flouted insofar as the Member States of the Organization have not honoured their obligation to compensate the financial losses incurred by the Pension Fund and have obliged pensioners to bear the brunt of the actuarial deficit.

Secondly, in view of the fact that a retirement pension is a form of deferred remuneration, he relies on the Tribunal's case law applying to remuneration and states that, by analogy, pensioners have a right to a "pension adjustment calculated by a method producing stable, foreseeable and clearly understood results". This right has been violated in the present case.

Thirdly, he claims that the pensioners' right to a "pension adjustment averting an erosion of their purchasing power which could ultimately lead to spoliation" has been violated. In his opinion the impugned decision did not take account of the criteria adopted for the adjustment of salaries. Noting that on 1 January 2005 salaries and allowances were increased by 1.3 and 1.7 per cent respectively, he submits that the provisions of Article II 1.15 of the Rules of the Pension Fund have been breached.

Fourthly, he criticises the arbitrary nature of the decision taken by the CERN Council and regrets that the prior consultation process had not been "conducted rigorously". He also regrets the fact that the Finance Committee and TREF had to debate the pension adjustment without being in possession of a copy of the actuarial review and without hearing a presentation from the actuary. Lastly, he considers that the decision is discriminatory as it does not tap the resources of either the Member States or the Organization.

The complainant asks the Tribunal to quash the decision of 12 April 2005 and to draw all legal consequences from such quashing. He also claims costs.

C. In its reply CERN submits that the impugned decision complied with the applicable rules and procedures. In its opinion, under the terms of Article II 1.15 of the Rules of the CERN Pension Fund, which establishes the Council's discretion with regard to pension adjustments, the Council is not bound automatically to adjust pensions in such a way that any rise in the cost of living is fully compensated.

Moreover, CERN holds that the reasons underpinning the impugned decision are perfectly legitimate. In its opinion, the Council exercised its discretion correctly whilst taking account of the criteria governing the adjustment of salaries. But having also borne in mind the worsening financial situation of the Fund, it considered that it was necessary to take immediate steps to avoid a further deterioration and that it was in the interests of the Fund's health to stabilise the latter's financial situation by not adjusting pensions in 2005, a measure which was "required by the principles governing responsible management of a pension scheme".

The Organization then replies to the complainant's four pleas. It holds that the first plea is irrelevant and unfounded, and that the second should be dismissed on the grounds that the case law on which the complainant relies relates to remuneration – and not to pensions – and that the Council's decision regarding the adjustment of pensions is based on objective, stable, foreseeable and clearly understood criteria. It draws attention to the fact that in Judgment 1912 the Tribunal recognised that international civil servants do not have an acquired right to an automatic indexing of their salaries, a principle which "logically" also applies to pensions. With regard to the third plea, CERN states that the complainant is not entitled to automatic compensation in respect of the impact of the rising cost of living, and that in the present case the Council fully honoured its obligations under Article II 1.15 of the Rules of the Pension Fund. Lastly, the Organization rejects the fourth plea: the fact that the Finance Committee did not have a copy of the actuarial review or hear a presentation from the actuary cannot, in its opinion, affect the lawfulness of the CERN Council's decision, for it is up to the Governing Board of the Pension Fund to receive and discuss that kind of report.

D. In his rejoinder the complainant points out that according to the case law a distinction must be drawn between an organisation's discretion and arbitrary action. Referring to Judgment 1821, he submits that CERN should have stated the reasons for its departure from the criteria adopted for the adjustment of salaries.

He asserts that CERN has not succeeded in establishing that the four pleas set out in his complaint are unfounded.

E. In its surrejoinder the Organization states that none of the arguments put forward in the rejoinder is sufficient to call into question the lawfulness of the impugned decision. It points out that on several occasions the Tribunal has had to examine CERN's method of adjusting salaries – a method which rests on the same principles as that used to adjust pensions – and that it has never criticised its compatibility with the fundamental rules governing the

functioning of the Organization. Similarly, in a number of judgments the Tribunal has acknowledged that protective measures to safeguard the financial situation of pension funds are the best defence against an erosion of pensions in the future and therefore constitute legitimate decisions. CERN adds that the CERN Council realises that the non-adjustment of pensions must remain an exceptional measure.

## CONSIDERATIONS

1. The complainant took retirement from CERN on 1 January 2001, since when he has drawn a retirement pension. An actuarial review of 22 July 2004 revealed that as at 1 January 2004 the financial situation of the CERN Pension Fund had greatly deteriorated in comparison with the position as at 1 January 2001, when the previous triennial review had been conducted.

2. By a letter of 17 December 2004 the Administrator of the Pension Fund informed the complainant – and all the other beneficiaries – that it had been decided that pensions would be adjusted by 0 per cent in the coming year. This decision had been taken by the CERN Council under Article II 1.15 of the Rules of the Pension Fund at its 131st Session held on 16 and 17 December 2004, and it constituted an initial protective measure to address the Fund's worsening financial situation. It had been adopted pursuant to a recommendation from the Governing Board of the Pension Fund and the Finance Committee, and after consultation of the Standing Concertation Committee – which comprises representatives of the Director-General and the Staff Association – and TREF – which comprises representatives of the Member States, the Management and the Staff Association.

3. In his letter the Administrator stated that several studies were under way to define measures for restoring the actuarial balance of the Pension Fund. He explained that the measures to restore the Fund's health which were being contemplated would concern not only the active staff and the beneficiaries, but also CERN and the European Southern Observatory (ESO), which are linked by agreements on social cooperation.

The complainant lodged an internal appeal which was dismissed in a decision of 12 April 2005 by the Chairman of the Governing Board, who authorised the complainant to bring the matter directly before the Tribunal.

4. The complainant seeks the quashing of the decision of 12 April 2005. In challenging that individual decision he is entitled incidentally to challenge the general decision taken by the CERN Council in December 2004 (see Judgment 2410, under 3).

5. The Tribunal will begin by considering two arguments put forward by the complainant in support of his fourth plea, which concern procedural matters. Firstly, he accuses the Director-General and the Council of having departed without reason from a proposal on which the bodies consulted appeared to have agreed. Secondly, he submits that no copy of the actuarial review was forwarded to TREF or to the Finance Committee and that neither of these bodies had the opportunity to hear a presentation from the actuary.

(a) The Staff Association stated that it did not support the proposal to adjust pensions by 0 per cent and requested postponement of the final decision. It considered that comprehensive measures to improve the Pension Fund's health could be taken speedily without imposing any particular sacrifice on pensioners. However, the proposal was supported by the representatives of the Member States in TREF and by the Finance Committee. There was therefore no agreement which might have been disregarded by the Director-General and the Council. This first argument is therefore without merit.

(b) The second argument refers to the amendment added in April 2005 to the minutes of the 131st Session of the Council, which reads as follows:

“The Council should be aware, however, that at the time of considering the above-mentioned reports and the Management's recommendation, the members of the Finance Committee and TREF had not been provided with a copy of the actuarial review, and neither body had had the opportunity to hear a presentation from the actuary. In discussion at Finance Committee, a number of members had said that they would have preferred to defer any recommendation to Council until they, and TREF, had been able to examine the actuarial review.”

In its reply the Organization states in this connection that:

“[t]he fact that the Finance Committee did not have a copy of the actuarial review or an opportunity to hear a

presentation from the actuary [...] cannot have a bearing on the lawfulness of the Council's decision. Indeed [...] according to the applicable rules and regulations, it is the Governing Board that must receive and discuss actuarial reviews of the Pension Fund. The Finance Committee and the CERN Council are informed of its opinion and decide whether to follow the recommendations it issues.”

This explanation is hardly satisfactory. Procedural rules which provide for prior consultation or discussion, and which entrust certain bodies with the task of formulating an opinion or a recommendation before a decision is taken, are established particularly in order that the decision-making authority may be informed as objectively and fully as possible about interests worthy of protection which its decision may harm; this should make it easier to gain the support of those concerned by the decision and should ultimately contribute to its smooth implementation. Advisory bodies can naturally play their role only if they have access to all the relevant information necessary for the formulation of their opinion.

In the present case, however, the complainant has not cited any rule or regulation stipulating that the actuarial review must be submitted to the advisory bodies and that the actuaries must be heard by these bodies. The sole issue which arises is therefore whether in the event the Finance Committee and TREF received enough information to be able to take a decision. The minutes of the 131st Session of the Council show that these bodies were fully informed of the Pension Fund's situation and of the precise circumstances prompting the Governing Board's recommendation. The amendment to the minutes makes no reference to a request from the Finance Committee or TREF that a copy of the review be provided or that the actuaries be heard, or to the refusal of such a request. It merely indicates that some committee members would have preferred to have received this additional information before the recommendation was adopted.

The second argument is therefore unfounded.

6. The purpose of the pension adjustment provided for in Article II 1.15 of the Rules of the Pension Fund is to protect retired staff members from the adverse repercussions of a rise in the cost of living on their purchasing power and hence in theory to maintain the standard of living their pension initially secured for them. When making this adjustment active members and retirees must be treated equally as far as possible.

Nevertheless, consideration should be given to preserving retirees' standard of living not just in the short term. They must be protected not only against the periodic erosion of their purchasing power but also against management measures that are liable to jeopardise the actual maintenance of their pension payments. Consequently, the obligation to adjust pensions from time to time in line with a rise in the cost of living is limited by the need to ensure the health of the pension scheme (see Judgment 2089).

A provident institution such as the CERN Pension Fund must therefore keep annual pension adjustments under Article II 1.15 of its Rules within the bounds of its financial capacity.

7. The complainant submits that the impugned decision breaches the “principle of the employer's social responsibility” and flouts “the pensioners' right to a pension adjustment calculated by a method producing stable, foreseeable and clearly understood results” and “averting an erosion of their purchasing power” which could ultimately lead to spoliation.

These pleas are unfounded.

The complainant does not dispute the Pension Fund's situation as it is described in the actuarial review of 22 July 2004. It was pointed out in that review that at 1 January 2004 the Fund's long-term funding ratio was no more than 96.1 per cent, a drop of almost 18 points compared with the situation as at 1 January 2001 recorded in the previous triennial actuarial review. Furthermore, the review of 22 July 2004 revealed that the Fund had an updated technical deficit of 254 million Swiss francs, whereas at the time of the previous review it had shown an updated technical surplus of 77 million francs. This trend was mainly ascribed to an economic factor, namely bearish financial markets, and to a structural factor, namely the inadequate funding of the benefits plan which had been aggravated in particular by the progression in life expectancy.

The CERN Council, which exercises supreme authority over the Pension Fund in accordance with Article I 2.01 of the Rules of the Pension Fund, was obliged to take steps to prevent a worsening

The decision not to adjust pensions in 2005 was intended as an urgent protective measure, and it appeared to be the

only measure of that kind that could be taken immediately. On adopting this measure the CERN Council demanded that the whole situation of the Pension Fund should be reconsidered as soon as possible and that a comprehensive package of measures should be submitted to it concerning all parties to the Pension Fund, namely the active staff, the beneficiaries and the Organization, in order to improve the Fund's capacity to meet its long-term liabilities.

8. The complainant is right to point out that the Council's decision is arbitrary and discriminatory insofar as it calls on the solidarity of current pensioners alone. However, that is not the case here.

Of course the Tribunal realises that this decision imposes a particular sacrifice on the beneficiaries of a retirement pension. But in view of the short-term nature of this sacrifice, its relatively limited scope, a reference rate of inflation of 1.7 per cent and the fact that it forms part of a package of measures, the Tribunal cannot hold that in adopting such a measure the CERN Council abused the discretion it must be allowed in deciding whether to adjust pensions in the light of the financial capacity of the Pension Fund over which it exercises supreme authority.

9. The complaint must therefore be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet