Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A., G., L. (No. 2) and S. A.

v.

CERN

130th Session **Judgment No. 4273**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. A., Mr N. G., Mr J. L. (his second) and Mr J.-L. S. A. against the European Organization for Nuclear Research (CERN) on 24 August 2018 and corrected on 20 November 2018, CERN's replies of 13 March 2019, the complainants' rejoinders of 17 June, corrected on 2 July, CERN's surrejoinders of 14 October, the complainants' further submissions of 18 December 2019 and CERN's final comments of 5 February 2020;

Considering the additional documents produced by CERN on 16 April 2020 at the Tribunal's request;

Considering the applications to intervene in Mr J. L.'s case filed by Ms D. G., Mr G.-H. H. and Mr K. W. on 7 February 2020 and by Mr M. G. and Mr I. W. on 25 February, and CERN's comments thereon dated 18 March 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases may be summed up as follows:

The complainants challenge their classification in the new career structure established following the 2015 five-yearly review.

Under the relevant provisions of the Staff Rules, the financial and social conditions of members of the personnel are subject to a five-yearly review to ensure that those conditions allow CERN to recruit and retain the staff members required for the execution of its mission from all its Member States. On 19 June 2014, the Council of CERN decided, on a proposal from Management, that the 2015 five-yearly review would focus on basic salaries for staff members and the career structure within the Organization. Following that review, the Director-General proposed to the Council that basic salaries be maintained at their current level, the career structure streamlined, and staff members better compensated for their performance by abolishing career paths and salary bands and replacing them with a new system comprising 10 grades, defined by a midpoint, minimum and maximum salary, within which a staff member could advance each year, and by replacing the system of in-grade advancement in steps with a new system of merit recognition. On 17 December 2015, the Council approved those proposals, which were scheduled to enter into force on 1 January 2016 in respect of the non-adjustment of basic salaries and 1 September 2016 in respect of the measures relating to the career structure. In implementation of the latter measures, staff members were assigned to "benchmark jobs", that is to say categories of jobs which covered a set of individual employment situations involving similar main activities and a common purpose. Those benchmark jobs were initially assigned on a provisional basis so that they could be reviewed later if need be. Thus, if staff members considered that they had been assigned to a benchmark job that did not match their functions, they could discuss the matter with their supervisors and the Administration. Benchmark jobs were to be definitively assigned to staff members by 1 May 2017, later postponed to 1 July 2017.

By individual letters dated 18 August 2016, the complainants were informed of the benchmark jobs to which they were provisionally assigned – "accelerator/industrial process operations technical engineer" for Mr A. and Mr S. A., "mechanical technical engineer" for Mr G. and "electromechanical technical engineer" for Mr L. – and the grade which they had been awarded from 1 September, namely grade 5. Their basic salaries remained the same.

On 13 December 2016 the complainants, together with other staff members, wrote to the Head of the Human Resources Department alleging that their Belgian diploma of *"ingénieur industriel"* had been underevaluated and that their benchmark job did not correspond to

either their competencies or skills. They were informed that their benchmark job depended on their functions and not on the diploma they held and that if they considered that their classification did not reflect the level of their functions, they could request a career review.

On 30 June 2017 the Head of the Human Resources Department confirmed their definitive benchmark jobs, which were the same as those assigned on 18 August 2016.

Between 14 October 2016 and 28 August 2017, the complainants each brought an internal appeal against the decision of the Council of CERN of 17 December 2015 to "alter the career structure and the associated salary scale". In their view, that alteration, and in particular their assignment to a new benchmark job, significantly diminished their career prospects and was purely arbitrary in that it reinforced the salary disparity between staff members. They requested that the general decision of 17 December 2015 be set aside.

Several other staff members filed an appeal with the Joint Advisory Appeals Board against the same decision. In view of the similarities between some of those appeals, the Board decided to deal with the alteration to the career structure and the classification of holders of a Belgian *"ingénieur industriel"* diploma jointly, and then consider the personal situation of each complainant separately. In its opinions of 27 April 2018, delivered after having heard the complainants, the Board found that the 2015 five-yearly review was not procedurally flawed and that the Organization had acted transparently. With regard to the new career structure, the Board recommended that more detailed information be provided to supervisors on the opportunities afforded by the new system in terms of promotion and merit recognition. As to the classification of holders of a Belgian diploma, the Board recommended that the Organization suggest to those staff members that they undergo a career review in order to ascertain whether a reclassification was warranted. Those general recommendations notwithstanding, the Board recommended that the appeals be dismissed.

By letters dated 25 May 2018, the complainants were individually informed that the Director-General had decided to follow the Board's recommendation and to dismiss the appeals, and that the Human Resources Department would contact them shortly regarding a career review. Those are the impugned decisions.

On 5 July 2018 Mr A., Mr G. and Mr S. A. were notified that their situation would be reviewed in line with the recommendation of the Joint Advisory Appeals Board. Mr L. was offered a career review but, alleging unequal treatment due to the composition of the panel undertaking the review, he did not attend the interview. No further career review was offered to him.

On 24 August 2018 the complainants filed their complaints with the Tribunal, requesting it to set aside the impugned decisions and the decisions of 30 June 2017 and 17 December 2015, to order that they each be paid 2,000 euros in compensation for the moral injury resulting from an alleged breach of confidentiality in the handling of their internal appeals, and to award them each 20,000 euros in costs. They further asked that their assignment to benchmark jobs as confirmed on 30 June 2017 be cancelled and that they be retroactively reclassified in the benchmark jobs of "engineer" (for Mr A., Mr G. and Mr L.) and "applied physicist" (for Mr S. A.) at an equal salary.

CERN requests that the Tribunal dismiss the complaints in their entirety.

By letter dated 7 January 2019, Mr A. was informed of the outcome of the career review, namely that his assignment to the benchmark job of "accelerator/industrial process operations technical engineer" no longer reflected his current functions and that he would be assigned to the benchmark job of "electromechanical technical engineer", still at grade 5, which corresponded to his level of functions and expertise. In a letter of the same date, Mr S. A. was notified that he would retain his benchmark job of "accelerator/industrial process operations technical engineer" and his grade 5 since his functions and activities were in line with his classification. On 13 February 2019, Mr G. was informed that he had been promoted to grade 6 with effect from 1 July 2018 and that he would retain his benchmark job of "mechanical technical engineer".

CONSIDERATIONS

1. Since the complaints include almost identical pleadings, concern the same organisation, advance the same arguments and make similar claims, they will be joined and dealt with in a single judgment.

2. The complainants seek the setting aside of:

– the general decision of the Council of CERN of 17 December 2015 adopting Management's proposals following the five-yearly review which "alter[ed] the career structure and the associated salary scale";
– the decisions of the Head of the Human Resources Department of 30 June 2017 confirming their assignment to grade 5 in the benchmark job of "accelerator/industrial process operations technical engineer" (in the case of Mr A. and Mr S. A.), "mechanical technical engineer" (in the case of Mr G.) and "electronics technical engineer" (in the case of Mr L.); and
– the Director-General's decisions of 25 May 2018 dismissing their internal appeal against the aforementioned decisions.

3. The complainants seek oral proceedings, but the Tribunal considers it is sufficiently informed of the cases by the content of the written submissions and does not regard oral proceedings as necessary.

4. The five-yearly review, approved by the Council of CERN on 17 December 2015, comprised several different parts, including:

– a part on the basic salary scale, which envisaged that basic salaries would not be adjusted; that part was implemented by keeping basic salaries at their previous level;
– a part on the new career structure, which had two main features: first, the existing structure (which included eight career paths, 21 salary bands and some 500 step positions) was replaced by a new structure that the Organization considered more consistent, composed of ten grades, and, second, the system of in-grade advancement in steps was replaced with a new merit recognition system combining recurrent elements (salary increases) and non-recurrent elements (performance payments) calculated as a percentage of the midpoint salary for the staff member's grade;
– a part on new social measures.

5. In their submissions, the complainants expound at length on a number of legal considerations which relate to:

– the non-adjustment of basic salaries;
– the gradual reduction in the staffing budget;

– the new social measures, which they analyse and criticise in detail. They conclude that these measures do not compensate for the reduction in the staffing budget and that CERN is not a "leading employer in terms of employee welfare";
– the breach of the Noblemaire principle, according to which international organisations must offer their staff pay that will enable them to attract and retain nationals of countries where salaries are highest;
– the breach of a customary rule which requires the Organization to draw up in advance a comparative report on the economic and financial climate prevailing in the Member States which justified the non-adjustment of basic salaries.

The Tribunal notes that these arguments, which do not appear to have been raised in the internal appeal proceedings, are, for the most part, set out in the section of the written submissions presenting the facts of the case. It is not therefore clear whether the complainants wish to raise them as pleas challenging the lawfulness of the general decision of the Council of CERN of 17 December 2015.

In any event, the grievances listed do not relate to the part of the five-yearly review that dealt with the new career structure. They concern the parts relating to the non-adjustment of basic salaries and the new social measures, which are not the legal basis for the individual decisions impugned in these complaints. The individual impugned decisions relate to the complainants' assignment to a new benchmark job and a new grade under the new career structure. Although the case law allows a complainant to challenge the lawfulness of provisions of a general decision in the context of a complaint impugning an individual decision, she or he may do so only to the extent that the individual decision is founded on those provisions.

The complainants' aforementioned grievances are therefore irrelevant.

6. According to the Tribunal's case law, an organisation has broad discretion when altering salary structures and grading systems (see Judgments 2778, under 7, 3921, under 11, and 4134, under 26 and 49) and classifying officials individually (see, for example, Judgment 1495, under 14). Decisions on such matters are therefore subject to only limited review by the Tribunal, which will censure them only if they

have been taken in breach of a rule of form or procedure, if they are based on an error of fact or law, if some essential fact was overlooked, if clearly mistaken conclusions were drawn from the evidence or if there was misuse of authority.

Several pleas raised by the complainants fall within the scope of the limited review thus defined, namely those challenging the lawfulness of the part of the five-yearly review relating to the new career structure on the ground that the procedure for its adoption was flawed in a number of respects, as well as those alleging a breach of acquired rights and the principle of equal treatment. The same also applies to the pleas alleging that the individual decisions of 30 June 2017 confirming the complainants' assignment to the benchmark job of "technical engineer" were procedurally flawed, that the Organization did not review the functions actually performed and that it breached its commitments by disregarding the Bologna Agreement on the equivalence of higher education qualifications. It is also true of the plea that the Joint Advisory Appeals Board failed to provide sufficient reasons for its opinions.

Those pleas will be considered below.

7. The complainants submit that the principle of *tu patere legem quam ipse fecisti* has been breached. Since the Organization did not carry out a comparative study before altering its career structure, they argue that it violated Article S V 1.02 of the Staff Rules and paragraph 4.2 of Annex A 1 to the Staff Rules and Regulations.

8. In the version applicable after 2016, paragraph 2 of Annex A 1 to the Staff Rules and Regulations provides that:

> "The five-yearly review must include basic salaries and may include any other financial or social conditions."

Paragraphs 4.1 and 4.2 of the Annex A 1 read in relevant part:

> "4.1 Data on salaries shall be collected from employers that recruit from the [Organization's main recruitment] markets [...].
>
> 4.2 For all grades, data on the other financial and social conditions to be examined are collected from the intergovernmental organisations that offer financial and social conditions that are among the most competitive, e.g. [the European Space Agency], the United Nations, the European Union, as the case may be."

9. The Organization contends that the comparative study referred to in aforementioned paragraph 4.2 need not be carried out on the career structure because, in its view, it is not one of the social and financial conditions defined in Chapters IV and V of the Staff Rules and Regulations. Rather, it is a human resource management tool governed by the rules set out in Chapter II, Section 2 of which covers classification and merit recognition.

10. Under Chapter IV, social conditions include various family benefits and types of social insurance.

Financial conditions, which are covered in Chapter V, are the financial benefits defined in Article S V 1.01 of the Staff Rules, the first paragraph of which reads as follows:

"Financial benefits shall mean:

a) remunerations (basic salary for staff members and stipend for fellows);

b) subsistence allowances for associated members of the personnel;

c) financial awards, payments, indemnities, allowances and grants paid by the Organization on the basis of the Rules and Regulations."

Having thus defined the concept of financial benefits, the same article provides that they are to be reviewed periodically as part of a five-yearly review, the method for which is specified in Annex A 1 to the Staff Rules and Regulations.

The basic salaries of CERN staff members were compared to salaries in the Organization's main recruitment markets, in compliance with paragraph 4.1 of Annex A 1.

As for the new career structure, it should be borne in mind that it consisted essentially of two components: first, the replacement of the former career paths and salary bands with a new structure comprising only ten grades and, second, the introduction of a new merit recognition system. Neither the new allocation of grades nor the new merit recognition system can be considered a financial condition as defined in Article S V 1.01. They therefore do not fall within the category of "any other financial [...] conditions [other than salaries]" which, under paragraphs 2 and 4.2 of aforementioned Annex A 1, may be examined in a comparative study of other intergovernmental organisations.

The Organization is not precluded from dealing with matters not listed in Annex A 1 during the five-yearly review, such as a new career structure, but in that case, the Organization does not need to collect data as specified in paragraphs 4.1 and 4.2 of Annex A 1.

Moreover, it would be somewhat paradoxical if the salary increases resulting from promotion or recognition of merit had to be compared with those of other international organisations but basic salaries did not undergo such a comparison. In fact, basic salaries are to be compared with salaries in the sectors corresponding to the Organization's "main recruitment markets", pursuant to paragraph 3 of Annex A 1.

Furthermore, an organisation is entitled to introduce a career system unlike that in any other organisation so that it can meet its own unique requirements. It is thus difficult to see how a comparison could be undertaken. That is the situation here, and the Organization rightly points out that such a comparison would be pointless since the career structure is a management tool to meet CERN's specific needs, which are different from those of other organisations.

The Tribunal cannot therefore accept the complainants' line of reasoning.

11. Admittedly, as the complainants note, during the 2005 five-yearly review, the Organization had considered that a comparative study should be carried out on the career structure and in-grade advancement system.

However, Annex A 1 to the Staff Regulations and Rules in force at the time expressly provided that "[t]he Council [could] also decide that comparative information be obtained and analysed regarding [...] career structure and development". The collection of data was hence optional, not mandatory. Furthermore, following an amendment made in 2007, that provision was no longer included in the text applicable at the time when the 2015 five-yearly review was conducted. The Organization explains that this provision was deleted because the comparisons carried out in the past with the systems of other international organisations had turned out to be irrelevant because of the highly specific situation of CERN staff members.

In any event, the Organization cannot be criticised for not having resorted to an option that was no longer provided for in the text in force at the time when the decision of 17 December 2015 was taken.

12. The complainants submit that, even if it is accepted that, from a legal point of view, the Organization did not have to carry out a comparative study in order to be able to revise the career structure, the fact remains that it breached the principle of estoppel and the principle that similar acts require similar procedures, because it had announced that such a study would be conducted.

It is true that Management's proposal for the five-yearly review, approved by the Council on 19 June 2014, contained a section entitled "Next Steps" according to which "data on the career structure [...] w[ould] be collected by CERN from the intergovernmental organisations".

The Organization submits that this passage was included by oversight. It states that it was an unfortunate error which did not reflect its intention. In support of this contention, it points out that, in response to a question raised on this matter during a meeting of the Standing Concertation Committee (SCC), Management explained that "the career structure is a human resource management tool that reflects the specific policy of each organisation and that, in respect of this aspect, there is no obligation to undertake point-by-point comparisons". Neither the Staff Association nor the Member States subsequently questioned the failure to collect comparative data.

The Organization's explanation seems plausible. Given that Management considered a comparative study on the career structure pointless and inappropriate, there is no reason why it would have deliberately proposed to the SCC that one be carried out.

13. The principle of estoppel implies, by definition, that a party has been induced to act to its detriment by relying on some statement or conduct of the other party (see Judgments 2873, under 7, and 3614, under 18). That is not the case here.

The principle that similar acts require similar procedures means that the amendment of a rule must respect the same process which was used for its adoption (see Judgment 1897, under 11(a)).

In this case, the Council's decision of 19 June 2014 to carry out a five-yearly review was not amended, so the principle that similar acts require similar procedures – or, more exactly, similar authority – cannot be relied on here. In reality, the complainants' criticism relates to Management's failure to follow the procedure which it had proposed and the Council had accepted. However, leaving aside the fact that the

passage stating that a comparative study would be carried out on the career structure was included by error, it should be borne in mind that by approving the five-yearly review, which set out in detail the procedure followed, the Council implicitly but unambiguously endorsed that procedure.

14. The complainants submit, however, that the Council did not make an informed decision and was misled by Management, in particular when taking its final decision. This, they say, is borne out by the fact that the introductory section to the proposals for the five-yearly review submitted to the Council in December 2015 states that "the data collection for [...] stipends, subsistence allowances and the CERN career structure was performed by CERN's Human Resources Department".

However, on reading those proposals and the table of contents, it immediately becomes apparent that although data was collected on basic salaries, stipends for fellows, and subsistence allowances for associated members of the personnel and on diversity-related conditions, it was not for the new career structure. The wording, albeit unfortunate, of a sentence in the introduction to the document could not, in this case, have misled the target readership on that point.

The procedure for conducting the five-yearly review was drawn up after a lengthy negotiation that lasted more than two years and had necessitated eight meetings of the SCC and seven meetings of the Tripartite Employment Conditions Forum, to say nothing of numerous briefing meetings organised by the Human Resources Department and the Staff Association. There is therefore no doubt that all those involved were aware of the procedure followed. The Joint Advisory Appeals Board was hence correct to consider that the proposals resulting from the five-yearly review had been adopted in a completely transparent manner.

The complainants' grievances are unfounded.

15. The complainants further contend that the amendment of the merit recognition system – one of the key components of the new career structure – had not been announced as one of the matters to be examined in the five-yearly review. They argue that since the Council of CERN had not authorised the Administration to alter the system, the Administration acted *ultra vires* by adding that component belatedly and on its own initiative.

However, the section entitled "CERN career structure" of the document on the five-yearly review, approved by the Council on 19 June 2014, explicitly states that:

> "In the framework of the 2005 five-yearly review, a new career advancement system was introduced with a view to optimise possibilities of rewarding performance. As principal measures, the step value was decreased and the merit recognition component was enhanced. Despite these, according to a recent staff survey conducted by the Organization, the motivation of the majority of the staff members and managers is not enhanced by the current system. [...] The Management therefore believes that the use of the underlying resources could therefore be further optimised with a view to maximize staff engagement and motivation."

The Organization rightly considers that it is obvious from those explanations that, from the very inception of the five-yearly review, the review of the career structure involved a review of the in-grade advancement system and, more generally, the merit recognition system.

16. The complainants next allege a breach of the principle, upheld in the Tribunal's case law, that the methodology chosen by an organisation to set salary adjustments for its staff must ensure "stable, foreseeable and clearly understood" results.

In essence, they argue that the procedure followed to design the new career structure was not transparent because no comparative study took place and no explanation was provided of the factors or statistics that were taken into account.

It has been explained above why the Organization did not need to carry out the comparative study provided for in Annex A 1 to the Staff Rules and Regulations. In addition, the Organization stated the reasons for its choices. It gave a transparent presentation of the new system at several briefing meetings. That system is perfectly clear. The grade allocated to each staff member came from a table transposing each former career path into a new grade. Assignment to new benchmark jobs was performed automatically using an algorithm which took into account the job title and employment code which had previously been applicable to each staff member. Benchmark jobs were initially assigned on a provisional basis to enable each staff member to check their suitability by approaching his or her supervisors and the Administration. If necessary, a career review could be carried out.

The actual design of the new career structure (for example, the structure of grades and their number) and the new merit recognition system (for example, the choice of financial incentives and their amount) falls within the Organization's discretion and, given the Tribunal's limited power of review in this matter, it is not for the Tribunal to substitute its assessment for that of the Organization (see Judgments 2778, under 7, 3921, under 11, and 4134, under 26 and 49).

Since the complainants have failed to prove that the Organization committed an obvious error, the plea must be dismissed.

17. The complainants further submit that the new system of advancement within the career structure is less favourable than the one previously in force and leads to an erosion of salaries, thereby breaching their acquired rights. They argue, first, that their retirement pensions will be considerably reduced because the new career development rules attach considerable importance to financial awards instead of steps and, second, that their salaries are lower than those which they were entitled to expect under the previous scheme, since the maximum position in Mr A.'s new grade corresponds to a basic monthly salary of 10,834 Swiss francs whereas it was 11,089 Swiss francs in his former career path, for Mr G. and Mr L. it corresponds to 10,834 Swiss francs instead of 11,740 Swiss francs and for Mr S. A. it corresponds to 11,740 Swiss francs instead of 12,600 Swiss francs.

18. As the Tribunal has pointed out on a number of occasions, the staff members of international organisations are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see Judgments 3876, under 7, 3909, under 12, and 4028, under 13). The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official

accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (see, for example, Judgments 2089, 2682, 2986, 3135, 3909 and 4028).

19. With regard to the calculation of retirement pensions, the complainants' assertion that the salary provided for in the new merit-based advancement system is not taken into account when pensions are calculated needs to be qualified. The new system has two components:

– first, the salary increase, which is a recurrent measure corresponding to 0.35 per cent of the midpoint salary of the staff member's grade for "fair" performance, 1.35 per cent for "strong" performance and 2.35 per cent for "outstanding" performance;
– second, the performance payment, which is a non-recurrent measure corresponding to 0 per cent of the midpoint salary of the staff member's grade for "fair" performance, 1.15 per cent for "strong" performance and 2.15 per cent for "outstanding" performance.

The salary increase is taken into account when calculating the pension. Only the performance payment is not.

As regards the complainants' salary and, specifically, the comparison between the maximum salary in the new grade and the maximum salary in the former career path, the Joint Advisory Appeals Board correctly observed that this comparison "[was] not relevant, since there is nothing to suggest that the staff members would have reached those salary positions, and in the new system (as in the former one) they are still entitled to apply for a promotion".

In addition, the new structure offers a significant advantage: staff members who have reached the maximum salary in their grade can receive a financial award each year in recognition of their performance, which was not the case in the former system. Mr L. and Mr S. A. benefit from this advantage. Mr A. can advance in his grade for several years. In addition, they can be promoted to grade 6 in their benchmark job. In that regard, CERN points out that the maximum salary for grade 6 (12,090 Swiss francs) is higher than the maximum in their salary band under the former system (11,740 Swiss francs). Mr G., for his part, was promoted to grade 6 from 1 July 2018 and can advance in that grade for

several years. Finally, all complainants may apply for higher grade posts through the internal mobility scheme.

The Organization also points that, since the introduction of the new career structure, Mr A.'s salary has risen by 7.5 per cent and he has received performance payments totalling 6,120 Swiss francs over the past three years. Mr G.'s salary has risen by 3.5 per cent and he has received performance payments totalling 2,571 Swiss francs over the past three years. Mr L.'s salary has risen by 4.1 per cent and he has received performance payments totalling 3,871 Swiss francs over the past three years. Finally, Mr S. A.'s salary has risen by 3.2 per cent and he has received performance payments totalling 2,584 Swiss francs over the past three years.

It follows from the foregoing that the new career structure does not adversely affect the balance of the complainants' contractual obligations and does not alter a fundamental term of employment in consideration of which they accepted their appointments. The new career structure has not, therefore, breached their acquired rights.

20. The complainants submit that, by replacing the former system based on advancement in steps, which, according to them, was automatic, the Organization violated a practice that could be considered a customary rule.

The Organization disputes the contention that, under the former system, the complainants were entitled to an automatic salary increase and submits that a step was awarded only if performance was rated as "meritorious" or "particularly meritorious".

In any event, it must be noted that Administrative Circular No. 26 (Rev. 11) of November 2016 on merit recognition put an end to any practice to this effect. According to the Tribunal's case law, an administrative practice cannot continue to apply when it has been expressly abolished by a legal provision (see Judgment 3524, under 5).

The plea is unfounded.

21. According to the complainants, the sole purpose of the new career structure was to achieve budgetary savings.

The stated reasons for revising the career structure were:

– to modernise policy, rationalise use of resources and increase staff motivation;

– to simplify career paths and the salary scale;
– to ensure the long-term sustainability of CERN by containing the continual increase in staff costs;
– to adapt to the Bologna Agreement on the equivalence of higher education qualifications.

Despite what the complainants submit, saving money was not the sole purpose of the new career structure. The Organization was entitled to take financial savings into consideration. What is more, paragraph 6 of Annex A 1 to the Staff Rules and Regulations provides that "[i]n taking its decision, the Council may take into account all relevant objective criteria related to the proper functioning of the Organization, including its budgetary situation".

The complainants' argument must therefore be rejected.

22. Next, the complainants contend that the principle of equal treatment has been breached because, firstly, in the new career structure, all of the salary bands in the former career path D – in which they were classified – have been transposed into a single grade, the new grade 5, whereas the salary bands of the former "academic" career paths Fc and G have been distributed between two new grades, namely grades 9 and 10.

The Organization explains that the former salary scale, which comprised numerous salary bands, was complex and inconsistent and that a number of anomalies needed to be corrected, including the overlap between some bands. The streamlining and simplification of the structure has resulted in some grades being shortened and others lengthened, but every staff member retains the basic salary that she or he received in the former system.

The Tribunal has consistently held that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990, under 7, 2194 under 6(a), 2313, under 5, 3029, under 14, 3787, under 3, and 3900, under 12).

The complainants submit that, in their new grade 5, their career prospects have been diminished in comparison with those offered by their former career path D, whereas, in the new grades 9 and 10, career

prospects have been greatly enhanced in comparison with the former career paths Fc and G.

However, suffice it to observe that the complainants are not in an identical or similar situation to that of staff members in the former career paths Fc and G. The different rule applied to them is appropriate in view of that dissimilarity.

The plea must be rejected.

23. The complainants allege a second breach of the principle of equal treatment in that, unlike them, some staff members changed benchmark job without a prior career review and others retained their benchmark jobs although those jobs no longer matched their current functions. The complainants are referring to secretaries, who were moved from the benchmark job of "personal/team assistant" to the new benchmark job of "executive personal assistant", and to Mr R., who was assigned to the benchmark job of "applied physicist" although he no longer performed that function.

With regard to secretaries, CERN explains that, on examination, it appeared that the original benchmark job did not correspond to their activities and that, consequently, they had been assigned to a new benchmark job while keeping their original grade, namely grade 5. With regard to Mr R., he was the President of the Staff Association and had been assigned to the benchmark job matching his functions prior to his election to that position and to which he would return at the end of his term of office.

The complainants are not in an identical or similar situation to that of secretaries or Mr R., who hold posts which are not comparable to those of the complainants.

This plea must be dismissed.

24. In addition to the numerous challenges to the lawfulness of the general decision of the Council of CERN of 17 December 2015 which have been examined above, the complainants enter a plea concerning the individual decisions of 30 June 2017 confirming their benchmark jobs. They contend that the principle *tu patere legem quam ipse fecisti* has been breached because the meeting with their supervisors and their human resources advisor provided for in an explanatory note did not take place. The note, entitled "What should I do if the benchmark job

to which I have been provisionally assigned doesn't match my actual functions?", stated that the staff member concerned could approach her or his supervisor and Group Leader or human resources advisor with a request for her or his functions to be compared with the benchmark job to which she or he had been provisionally assigned and that, in all cases, a briefing meeting would be held with the human resources advisor, the supervisor and the Group Leader.

The complainants approached the Head of the Human Resources Department directly, rather than their supervisor or human resources advisor. In a joint letter of 13 December 2016, they explained to him that their *"ingénieur industriel"* diploma awarded in Belgium had been underevaluated and that their jobs did not correspond to grade 5 but to grade 6 or 7.

It should first be observed that the aforementioned explanatory note concerned solely assignment to benchmark jobs. Insofar as the complainants sought to be assigned to another grade, the explanatory note did not apply. However, it is clear from the context that, in fact, the complainants wished to be assigned to the benchmark job of "engineer", which spans grades 6, 7 and 8.

The letters of 18 August 2016 advising the complainants of their provisional benchmark jobs and grades stated that their supervisor and human resources advisor were available to discuss these, in particular if they considered that they had not been assigned to the benchmark job that matched their current functions. The explanatory note enclosed with those letters stated that a staff member could be assigned to a different benchmark job following such a discussion but that she or he could only be assigned to a benchmark job with a higher grade as a result of a promotion. Given that, according to paragraph 46 of Administrative Circular No. 26 (Rev. 11), a promotion must be preceded by a career review, the explanatory note must be understood as meaning, in this case, that the benchmark job which the complainants wished to obtain could only be assigned to them through a career review.

Consequently, the meeting referred to by the explanatory note on which the complainants base their argument would have served no purpose since the matter could only be resolved through a career review.

The plea must be rejected.

25. The complainants take issue with CERN for having confirmed their provisional benchmark jobs and grade without having examined what functions they actually performed.

As explained above, since the complainants disputed both their benchmark jobs and their grade, a career review was required, the very purpose of which is "to assess the level of expertise, as well as the level of functions exercised by the staff member" (paragraph 45 of Administrative Circular No. 26).

Paragraphs 49 and 50 of Administrative Circular No. 26 (Rev. 11) provide that:

> "A career review shall normally be initiated by the Head of Department of the staff member concerned.
>
> A staff member may, at any time, also submit a written substantiated request for a career review to the Director-General. If this request is rejected, the Director-General shall inform the staff member of the decision in writing, stating the reasons. [...]"

Since career reviews are normally initiated by the Organization, it ought to have arranged for such reviews to take place. However, the Tribunal will not censure this irregularity since the Head of the Human Resources Department gave the complainants the opportunity to request career reviews themselves.

If the functions actually exercised by the complainants were not examined, it is because they refused that offer.

The plea is unfounded.

26. As regards the award of grades, the complainants allege that there has been an infringement of Article R II 2.10 of the Staff Regulations, from which they infer that grades must be decided on the basis of the level of the functions, expertise and performance of staff members, whereas the Organization considered that grades depended only on the functions exercised.

However, it suffices to note in this respect that the factors listed in that Article are cumulative. As the Organization considered that the complainants' functions did not correspond to the grade to which they argued they were entitled, it did not have to take the other factors into consideration.

The plea is unfounded.

27. The complainants argue that CERN breached its commitments by disregarding the Bologna Agreement on the equivalence of higher education qualifications. They contend that since that reform, their *"ingénieur industriel"* diploma, awarded in Belgium had been regarded as equivalent to the academic grade of a Master's degree and that they should have been assigned to the benchmark job of "engineer" (which spans grades 6, 7 and 8) and not "technical engineer" (which spans grades 4, 5 and 6).

However, the Organization is correct to make the classification of a job contingent on the level of functions performed and not on the level of the diploma, which is a condition of eligibility for a post, either on recruitment or internal promotion. The recognition or the award of an advanced degree does not automatically entail reclassification.

Furthermore, the issue of the equivalence of the Belgian diploma of *"ingénieur industriel"* predates the 2015 five-yearly review. It is true that, in connection with that review, the Organization had stated that the new career structure would be adapted to "recent evolutions in the employment market, in particular the harmonisation of diplomas as a result of the Bologna [Agreement]". However, that statement related to recruitment, and not to the situation of serving staff members. The complainants' arguments are therefore not supported by the proposals for the five-yearly review as approved by the Council of CERN. Nevertheless, since the Organization has accepted that the Belgian diploma of *"ingénieur industriel"* is equivalent to a Master's degree, there is nothing to prevent the complainants from applying for promotion to the benchmark job of "engineer".

28. Finally, the complainants contend that the Joint Advisory Appeals Board failed to state sufficient reasons for its opinions. They maintain that, in the section dealing with the joint hearing concerning the classification of holders of the Belgian diploma of *"ingénieur industriel"*, the Board confined itself to stating that "the request for the cancellation of the allocation of the benchmark job [of] 'technical engineer' and for their assignment to the benchmark job of engineer is not well founded since all CERN staff members were classified in a manner that was transparent, foreseeable and documented" and that this explanation does not respond to the pleas raised in the internal appeals. Likewise, according to the complainants, the finding that "the Board considers that the administrative decision on (their) classification was

taken in accordance with the applicable procedures and that there is therefore no reason to reconsider it" does not by itself constitute an adequate response to their allegations of procedural defects.

The complainants do not specify which pleas they are referring to specifically. However, it is true that the statements that the procedures were transparent, foreseeable and documented and that the procedures in force were complied with are, on their own, overly broad formulations which do not fulfil the duty to state reasons.

Ordinarily, the Tribunal would therefore set aside the Director-General's decisions of 25 May 2018 endorsing the recommendations of the Joint Advisory Appeals Board and refer the cases back to the Organization for the Board to deliver new, properly reasoned opinions.

However, it will not do so here since, in the proceedings before the Tribunal, the complainants have raised – and expounded at length – their pleas concerning the procedural flaws and lack of transparency to which the Joint Advisory Appeals Board did not respond. As the Tribunal has examined these pleas, there is no need to refer the cases back to the Board.

29. The complainants seek an award of 2,000 euros each in moral damages. They contend that persons not involved in the procedure were informed by the Administration of their internal appeals without their consent, and that this breach of confidentiality caused them moral injury. They refer to the letter of 5 July 2018, copied to their Head of Department, in which the Head of the Human Resources Department stated that, following the Director-General's decisions of 25 May 2018, they would be contacted shortly with a view to arranging a career review. That letter did not mention that the decisions of 25 May 2018 were the decisions taken following their internal appeals and did not disclose their content. It was perfectly proper for their Head of Department to be informed by the Organization of their upcoming career reviews.

That claim must be rejected.

30. It follows from the foregoing that the complaints must be dismissed in their entirety. In consequence, the applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 23 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ