Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.

v.

CERN

134th Session **Judgment No. 4498**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. R. against the European Organization for Nuclear Research (CERN) on 5 June 2019 and corrected on 26 July, CERN's reply of 31 October 2019, the complainant's rejoinder of 11 February 2020, CERN's surrejoinder of 18 May, the complainant's additional submissions of 10 July and CERN's final comments of 21 August 2020;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision to reject his claim concerning a surviving spouse's pension.

The complainant is a former staff member of CERN. When he retired in April 1999, he was married to his first spouse.

In December 2005, the Pension Fund Rules and Regulations were modified in particular with respect to the pension for a surviving spouse. Entitlement to the pension for a surviving spouse would no longer be automatic for a person marrying a beneficiary of a retirement pension on or after 1 August 2006; the beneficiary of the retirement pension would have to submit a request to acquire that entitlement shortly after

the marriage, and would have to pay a premium for the surviving spouse's pension.

In 2013, the complainant's spouse died; he remarried in 2016 to a staff member of CERN, who was a member of the Pension Fund in her own right. He notified the Pension Fund Management Unit of his marriage and was informed, by a letter of 2 February 2017, that the Fund's Actuary had indicated that the estimated monthly premium he would have to pay to procure an entitlement to a surviving spouse's pension for his wife after five years of marriage was 18,793 Swiss francs. In March, he filed an internal appeal with the Pension Fund Governing Board against that decision, alleging, *inter alia*, that he had an acquired right to a free surviving spouse's pension for his new wife.

In July 2017 the Chief Executive Officer (CEO) of the Pension Fund informed him that the Tribunal had rendered Judgment 3876 in June on a complaint filed by another retiree who had contested the modifications adopted in 2005 regarding, *inter alia*, the surviving spouse's pension.

On 14 November 2017 the CEO replied to the complainant's request of August regarding the calculation of the premium, stating that he had requested a revision of the methodology for the Actuary's calculation. Hence, the Actuary had recalculated the premium and concluded that an estimated monthly premium of 10,912 Swiss francs would apply. On 7 February 2018 the CEO wrote again to the complainant stating that his letter of 14 November 2017 cancelled and replaced the earlier one of 2 February 2017; consequently, the appeal filed against the latter decision was moot. The CEO added that, if the complainant wished to appeal the decision set out in the letter of 14 November 2017, the date of notification would be 29 January 2018, when the complainant found the letter in his office, rather than the date on which it was sent to him electronically. Hence, on 27 March 2018, the complainant filed an appeal with the Pension Fund Governing Board against the decision of 14 November, arguing that his wife was entitled to a surviving spouse's pension in the event of his death without him having to pay the requested premium. If he nevertheless had to pay a premium, he

contested the amount due on the ground that the calculation method used was arbitrary.

The Pension Fund Governing Board heard the complainant before issuing its decision on 8 March 2019. It dismissed the appeal on the ground that there was no violation of the Fund's Rules and Regulations. It explained that the new legal framework concerning the surviving spouse's pension had been unanimously approved by the Member States with a view to protecting the Fund's financial balance and thereby its future functioning. Concerning the calculation of the premium, it rejected any arbitrariness, noting that the pre-existing calculation method was incompatible with the unique circumstances of the case, that is to say the amount of the complainant's retirement pension and the spouses' respective ages and life expectancies; indeed, it would result in an unusually high amount to be paid to his spouse as surviving spouse. The Board considered that it was unfortunate that two successive calculations, with significantly different results, had been produced. It noted, however, that the updated calculation methodology requested by the CEO had been conducted and provided to the complainant in full transparency. It rejected the complainant's argument that the Actuary should have taken into account the contributions he had paid into the Fund while he was a member, emphasising that members of the Fund do not accumulate a "credit" allowing them to purchase optional benefits when they become beneficiaries. It also rejected the alleged unequal treatment between members and beneficiaries of the Fund on the ground that they were not in the same situation. Pursuant to the Pension Fund's Rules and Regulations, this decision may be appealed directly before the Tribunal. It is consequently the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the decision of 8 March 2019 or, in the alternative, to order that the additional premium he would have to pay be recalculated by an independent Actuary agreed to by the parties; the recalculation should not result in the "deprivation" of his retirement pension. He also asks the Tribunal to ensure that the condition of being married for five years does not apply since he had a

pre-existing entitlement to "spouse benefit" resulting from his first marriage. He also claims an award of moral damages and costs.

CERN asks the Tribunal to reject the complaint as devoid of merit. It makes a counterclaim for costs considering that the complaint is an abuse of process, is vexatious and frivolous.

CONSIDERATIONS

1. The complainant impugns the decision of 8 March 2019, issued by the Governing Board of the Pension Fund of CERN, which dismissed the internal appeal he lodged against the decision of the Pension Fund's CEO, dated 14 November 2017, fixing at 10,912 Swiss francs the monthly premium for the procurement of a surviving spouse's pension for his wife (whom he married after he had retired from work), in application of Article II 5.09 of the Fund's Rules. The reasoning in the impugned decision was grounded on a similar case, decided by Judgment 3876 delivered by the Tribunal in June 2017, and can be summed up as follows:

a) Judgment 3876 stated that Article II 5.08 introduced in 2006, after the complainant's retirement, does not violate any acquired right;

b) correctly the Actuary did not take into account, in the calculation of the premium owed for the procurement of a surviving spouse's pension, the contributions paid by the complainant whilst he was a member of the Fund;

c) there was no inequality of treatment, since the beneficiaries of the Fund are not in the same situation as the members of the Fund; and

d) there was no arbitrariness of the calculation methodology followed to fix the monthly premium.

2. By his first plea, the complainant alleges a violation of his acquired rights. The plea may be summed up as follows:

(a) the complainant is aware of the principles set out in Judgment 3876, but objects that that judgment has no *res judicata* authority in the present case, and it is not applicable, since the facts and circumstances

are different. In particular, the complainant was married during his entire service at CERN and the 2005 amendments resulted in a "devastating loss of his retirement pension" since the "premium [...] imposed result[ed] in deprivation of his retirement pension". He adds that, even if it is not disclosed, it can reasonably be assumed that the complainant in Judgment 3876 did not lose his retirement pension by virtue of the new rules;

(b) the complainant adds that in Judgment 3876, the Tribunal solely assessed the general principle of acquired rights as no other legal arguments were raised. The complainant here raises a further argument grounded on Article III 1.02 of the Pension Fund's Rules, entitled "Acquired Rights". Based on that provision, he alleges that he has acquired rights, including the right to a surviving spouse's pension according to the rules applicable before the 2005 amendments entered into force in August 2006;

(c) the complainant also observes that Article II 5.01 states that the condition of five years' marriage to obtain the surviving spouse's pension does not apply if the entitlement was pre-existent, thus providing that beneficiaries of the Fund might remarry after retirement;

(d) furthermore, Article II 5.07 deals with the reduction of the amount of the surviving spouse's pension where there is a significant age difference between the deceased beneficiary and the surviving spouse, therefore providing, again, that beneficiaries of the Fund might remarry after retirement;

(e) CERN, allegedly, does not contend that the right to a surviving spouse's pension is an acquired right, but asserts that this right still exists following the 2005 amendments; according to the Tribunal's case law, the magnitude of the loss resulting from amendments to contractual provisions is a significant factor in deciding to give effect to an acquired right or not. In the present case, the premium that was set results in a reduction of two thirds of the retirement pension; it therefore violates the principle of acquired rights, given the large magnitude of the change and the impact on his retirement pension; in his additional submissions, in response to CERN's surrejoinder, the complainant submits that his gross pension is subject

to income tax (in Switzerland) and therefore his net pension (allegedly 10,005 Swiss francs) would be less than the requested premium (10,912 Swiss francs); as a result, "he is deprived of his pension";

(f) the Governing Board, by dismissing the complainant's internal appeal, ignored his financial damage and gave priority to the need to protect the financial balance of the Fund and its future functioning. However, the complainant submits that CERN provided no evidence to the Governing Body of that need which seems unfounded, given that since 2006 there has been an estimated total number of less than five "premium" requests under Article II 5.09, to be compared with the approximately 3,600 beneficiaries of the Fund.

3. It is convenient to reproduce, in the relevant parts, the Rules applicable to the present case, contained in the CERN Pension Fund's Rules.

Articles I 1.05 and I 1.06 defined, respectively, the "members" and the "beneficiaries" of the Pension Fund, as follows:

Article I 1.05:

"[...] shall be members of the Fund:

a) members of the personnel of CERN with a contract of at least six months' duration as a staff member or as a fellow; [...]"

Article I 1.06:

"Any person receiving a benefit from the Fund in application of the Rules, with the exception of a transfer value, is a beneficiary of the Fund. [...]"

Article I 3.01 stated that the resources of the Fund shall derive, *inter alia*, from:

"a) contributions from CERN [...];

b) contributions from its members; [...]"

As to the amount of contributions owed by the members of the Fund and by CERN, Article II 1.07 stated:

"The contributions shall be expressed as a percentage of each member's reference salary and shall be apportioned between the member and the participating Organizations as follows:

a) for members who joined the Fund on or before 31 December 2011: member: 11.33%; Organization: 22.67%; total: 34%;

[...]

The Council may review the contributions to the Fund, and decide on special contributions designed to ensure its long-term stability, either from the participating Organizations or from the members, or both."

As to the entitlement to a surviving spouse's pension, Article II 5.01 stated, in the relevant part:

"The following shall be entitled to a pension for surviving spouse:

[...]

b) the spouse of a deceased beneficiary whose marriage dates from at least five years prior to the decease. This condition of duration of the marriage shall not apply if the entitlement was pre-existent [...]"

At the time he retired in 1999, pursuant to Article II 5.01, the entitlement to the surviving spouse's pension was independent of whether the marriage had taken place before or after the member of the Fund (that is the staff member) had become a beneficiary (that is after the staff member's retirement).

With effect from August 2006, the Rules of the Pension Fund were amended for the purpose of protecting the Fund against situations considered outside the scope of its responsibility. Among other things, new Articles II 5.08 and II 5.09, regarding the entitlement to a surviving spouse's pension, were approved. Their meaning and operation are central to these proceedings.

Article II 5.08 stated:

"***Non-entitlement to Pension for Surviving Spouse***

Notwithstanding any other provision of these Rules, a marriage to a beneficiary of a retirement pension taking place on or after 1 August 2006 shall not give rise to entitlement to a surviving spouse's pension."

Article II 5.09 stated:

"***Procurement of an Entitlement to Pension for Surviving Spouse***

Where, pursuant to Article II 5.08, there is no entitlement to a surviving spouse's pension, the beneficiary may acquire an entitlement to a surviving spouse's pension for his spouse by submitting a request within 180 days of the date of marriage. The corresponding premium for the surviving spouse's pension shall be deducted from his retirement pension, under conditions defined by the Chief Executive Officer in the light of the Actuary's calculations."

4. The issue whether Articles II 5.08 and II 5.09 infringed the "acquired rights" of those who became beneficiaries of the Fund before 31 July 2006, but married on or after 1 August 2006, has already been dealt with by the Tribunal, in Judgment 3876, in a case where the complainant, a beneficiary of the Fund before 31 July 2006, had married after 1 August 2006. In that case the Tribunal held:

> "Regarding the claim relating to the payment of a surviving spouse's pension, the Tribunal notes that under Article II 5.08 of the Rules of the CERN Pension Fund, 'a marriage to a beneficiary of a retirement pension taking place on or after 1 August 2006 shall not give rise to entitlement to a surviving spouse's pension'. It follows from this provision that the complainant's marriage on 24 October 2011 did not confer any entitlement to a surviving spouse's pension.
>
> The complainant contends that this provision, which was adopted in December 2005, does not apply to him as it would breach his acquired rights. The Tribunal draws attention to the fact that international organisations' staff members do not have any right 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.
>
> Of course the position is 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, according to the case law established for example in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, 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 (in this connection see also Judgments 2089, 2682, 2986 or 3135).
>
> The possibility for a spouse whom the official has married after his retirement to benefit from a surviving spouse's pension cannot be viewed as fulfilling that condition, and it is clear that the amendment in this regard did not adversely affect the balance of contractual relations. Nor did it alter fundamental terms of employment in consideration of which the complainant

> accepted an appointment with the Organization in 1962, or which subsequently induced him to pursue his career there." (Judgment 3876, consideration 7.)

5. The Tribunal observes that Judgment 3876 has no *"res judicata"* authority in the present case, since the force and effect of *"res judicata"* can only be attributed to a judgment rendered between the same parties, and this is not the case here. The applicable approach is *stare decisis*. As the Tribunal stated in Judgment 2220, consideration 5:

> "The complainant confuses the rule of *res judicata* with the rule of *stare decisis*. The former, which is a rule of law, applies absolutely when the necessary three identities of person, cause and object are present, which is not the case here. The latter rule, which is simply a matter of judicial practice or of comity, holds that, in general, the Tribunal will follow its own precedents and that the latter have authority even as against persons and organisations who were not party thereto, unless it is persuaded such precedents were wrong in law or in fact or that for any other compelling reason they should not be applied."

The Tribunal abides by its own precedent insofar as it agrees that the possibility for a spouse whom the official has married after her or his retirement to benefit from a surviving spouse's pension cannot be viewed as a fundamental and essential term of employment within the meaning of Judgment 832. This approach is endorsed by the Tribunal in the present case as the legal and factual situation is essentially the same as the situation in the case decided in Judgment 3876, whilst the alleged distinctions are marginal or irrelevant. In both cases, the beneficiary of the Fund married after the entry into force (as from 1 August 2006) of the rules approved in 2005. Moreover, both in the present case and in the one decided in Judgment 3876, the complainants had retired long before the new rules entered into force in 2006, and had married long after 2006.

6. As to the complainant's further argument grounded on Article III 1.02 of the Pension Fund's Rules, entitled "Acquired Rights", the Tribunal observes that, contrary to what CERN contends in its reply, Judgment 3876 did not deal expressly and specifically with an argument to this effect, and therefore this argument, which is relevant to the present case, shall be addressed in these proceedings.

Article III 1.02 read as follows:

> "Acquired rights are the rights to benefits which were applicable to those who were members of the Fund before the entry into force of the present Rules and which result from the Rules of the Fund to which they were subject, where these are more favourable to them.
>
> The provisions of this Article shall not apply to members who joined the Fund on or after 1 January 2012."

This provision cannot be read and interpreted in isolation, but must be read in conjunction with Article II 5.08, which read as follows:

> "Notwithstanding any other provision of these Rules, a marriage to a beneficiary of a retirement pension taking place on or after 1 August 2006 shall not give rise to entitlement to a surviving spouse's pension."

The phrase at the beginning of Article II 5.08 – "Notwithstanding any other provision of these Rules" – means that the provisions set out in Article II 5.08 prevail over every other provision of the Pension Fund's Rules, therein including Article III 1.02. Therefore, the express rule on acquired rights enshrined in Article III 1.02 is not applicable to the surviving spouse's pension. Moreover, this rule codifies the general principle of acquired rights and replicates the said principle: in the present case there was no violation of an acquired right for the reason already given in consideration 5 above. The complainant's argument is therefore unfounded.

7. The complainant further submits, based on Article II 5.01, that the condition of five years of marriage to qualify for a surviving spouse's pension does not apply if "the entitlement was pre-existent", therefore allowing that beneficiaries of the Fund might remarry after the retirement. This argument is irrelevant. The issue at stake is the conditions of entitlement to a surviving spouse's pension, and these conditions are set out partly in Article II 5.01 and partly in Articles II 5.08 and II 5.09. Article II 5.01 deals only with the issue of the minimum duration of marriage, minimum duration that does not apply if the entitlement was pre-existent. This provision does not contradict the further conditions set out in Articles II 5.08 and II 5.09. These articles, by excluding the entitlement to a surviving spouse's pension in case of marriage after the retirement of the beneficiary of a retirement pension,

unless a premium is paid, do not contain the same exemption as set out in Article II 5.01, for the occurrence of a pre-existent entitlement. This exemption, being contained only in Article II 5.01, cannot be extended to Articles II 5.08 and II 5.09.

8. Likewise and for similar reasons, the complainant's argument based on Article II 5.07 is irrelevant. Article II 5.07 provides for a reduction of the amount of the surviving spouse's pension where there is a significant age difference between the deceased beneficiary and the surviving spouse, therefore providing, again, that beneficiaries of the Fund may remarry after retirement. The issue at stake is the conditions of entitlement to a surviving spouse's pension, and these conditions are not set out in Article II 5.07, which only deals with the issue of the amount of the pension, but in Articles II 5.08 and II 5.09. These articles are not inconsistent with Article II 5.07.

9. The alleged differences in fact and law, as well as the further legal arguments raised, are not sufficient to affirm that in the present case, unlike the one decided by Judgment 3876, Articles II 5.08 and II 5.09 infringed an acquired right of the complainant. There is no such infringement. The alleged factual differences, that (i) the present complainant had already been married before his retirement and his first spouse predeceased him; and (ii) the premium required for the complainant in the case decided by Judgment 3876 was supposedly lower than the one required for the present complainant, are not proven and are in any case irrelevant. The circumstance that the complainant was already married during active service does not give rise to the entitlement to the surviving spouse's pension that he now claims, since the complainant's first spouse passed away. Therefore, what is now at stake is a surviving spouse's pension for a different spouse, whom the complainant married after his retirement and after the 2006 entry into force of the amended regulation.

10. The complainant's challenge to the amount of the premium on the ground of the infringement of an acquired right is misconceived. In the complainant's view, a high premium should be regarded as an

infringement of an acquired right. The Tribunal observes that the principle stated in Judgment 3876 is that there is not an acquired right to a surviving spouse's pension in the event of marriage after retirement, given that the possibility for a spouse whom the official married after her or his retirement to benefit from a surviving spouse's pension does not fulfil the condition of a fundamental and essential term of employment. This principle is applicable regardless of the amount of the premium. Indeed, if there is no acquired right, the amount of the premium is irrelevant, since it only concerns the purchase of a "new right" under Article II 5.09. Its rate in no case infringes an acquired right, so the criteria adopted to set the premium cannot be challenged with arguments regarding acquired rights.

The complainant challenges the premium also on additional arguments partially contained in his first plea, and especially in his second and third pleas, that will be examined in the considerations below.

11. The Tribunal firstly addresses the complainant's contention, contained only in his additional submissions, and not raised in the complaint nor in the rejoinder, that his pension is subject to national income tax. Allegedly, the net pension after taxation amounts to 10,005 Swiss francs, less than the required premium (10,912 Swiss francs). The Tribunal notes that the complainant has not provided documentary evidence of the tax regime of his pension; he has not indicated the applicable tax rate on his pension, nor whether in this respect and to what extent the premium would be deductible from his gross income before the application of the tax rate on the remaining income. In the absence of these essential data (the tax rate and the fiscal regime of the premium), it is not possible to assess the net amount of the retirement pension, after the fiscal deduction of the premium and the application of the tax rate.

In any case, and even if it were proven that the premium was higher than the net amount of the retirement pension, there is no breach of acquired rights because the high monthly premium cannot be taken into account on its own, but must be considered in light of the foreseeable duration of the right to receive a surviving spouse's pension. Indeed, in cases such as the present one, where the age difference between the beneficiary and her or his spouse is significant – approximately twenty-

seven years – the amount of the premium is calculated taking into account that it will ordinarily be paid for few years, much less than the years for which the surviving spouse will receive a pension, the amount of which would be significant in the present case.

12. The complainant tries to challenge the amount of the premium with further arguments relating to the exercise of discretion and to unequal treatment.

He claims a factual difference between his case and the one decided by Judgment 3876, based on the different amount of the premium in the two cases. The Tribunal observes that the factual difference based on the amount of the premium is not relevant unless and until it is proven – and it is not – that the Actuary followed different criteria, in the two cases, to fix the premium, to the detriment of the current complainant. The determination of the premium is the outcome of technical rules which – as in many pension schemes – take into account a number of factors, namely (i) the amount of the retirement pension, (ii) the consequent amount of the surviving spouse's pension to be paid (in proportion to the amount of the retirement pension, pursuant to Article II 5.05 and Annex B), (iii) the expected life span of the beneficiary of the retirement pension, according to her or his age, (iv) consequently the expected number of monthly premiums that she or he is due to pay, and (v) the expected life span of the surviving spouse according to her or his age. The application of criteria based on these factors may lawfully lead to a different amount of the premium where the factual elements are different, but a different factual amount of the premium (calculated on the basis of the same criteria) can be considered in itself neither an infringement of acquired rights, nor as evidencing unequal treatment.

It follows from the above considerations that there is no need for a further enquiry into the amount of the premium claimed from the complainant in Judgment 3876, nor into the amount of the premium claimed from other beneficiaries. Indeed, the Organization lawfully refused to disclose these data (due to their confidentiality) and the complainant's request to access them shall be dismissed as irrelevant to the outcome of the present case.

13. The complainant's submission that, according to the Tribunal's case law, the magnitude of the loss resulting from amendments to contractual provisions is a very significant factor in whether to give effect to an acquired right, has already been answered by the Tribunal in considerations 10, 11 and 12 above. The Tribunal reaffirms that the loss of pension following the payment of the premium is adequately balanced by the benefits that can be acquired with the procurement of a surviving spouse's pension for a number of years potentially widely exceeding the remaining duration of the retirement pension.

14. The last submission underpinning the complainant's first plea, alleging a failure to take into account his financial loss and the cost for the Pension Fund, is unfounded. The purpose of Articles II 5.08 and II 5.09 is clear, and by limiting these benefits or requiring the payment of an additional premium, they are intended to protect the Fund's financial balance and its future operation. The factual circumstances alleged by the complainant, based on a number of less than five "premium" requests under Article II 5.09, to be compared with approximately 3,600 beneficiaries of the Fund in the same period, do not prove that there is no need to protect the Fund's financial balance and its future operation. The circumstance that the Fund has 3,600 beneficiaries reinforces the evidence that such a large number of beneficiaries (who benefit from the Fund but no longer contribute to it) – especially when compared to the number of active staff members contributing to the financing of the Fund – makes it essential to ensure the viability of the Fund and its balance.

15. By his second plea, the complainant alleges that:

a) the calculation of the premium was unlawful;

b) according to the Tribunal's case law, the methodologies adopted by international organizations for setting and adjusting the remuneration of staff members must be stable, foreseeable and clearly understandable; this principle must be applied in the present case;

c) the calculation method used to determine the premium in order to purchase a surviving spouse's pension is arbitrary and the CEO himself admitted in the letter of 14 November 2017 that "it [was] a rather complicated matter";

d) the amended Rules did not provide for a lawfully adopted methodology, since they merely stated that the premium would be defined by the CEO in the light of the Actuary's calculations;

e) these "'conditions' appear to relate solely to the method for deducting of the premium from the retirement pension, and not to the calculation for reckoning the premium";

f) the initial methodology applied, which was not disclosed, resulted in a monthly premium of 18,793 Swiss francs, higher than the monthly retirement pension amount. The second calculation resulted in a lower monthly premium of 10,912 Swiss francs. The lack of any applicable methodology in the Rules represents "a serious lacuna" in the 2005 amendments;

g) the complainant had requested that his many years of contributions until his retirement while he was married be taken into account, but to no avail.

The complainant asks the Tribunal to either order CERN to grant the surviving spouse's pension without the payment of premiums or order "the establishment of a mutually agreeable methodology applied by a mutually agreeable and independent [A]ctuary".

In his rejoinder, the complainant insists that the methodology is not stable and foreseeable and asks the Tribunal to order CERN to produce: (i) the number of requests for surviving spouse's pension made since the adoption of the amendments in 2005; (ii) the premium calculation(s) rendered for each request; and (iii) the amount of the retirement pension paid to each beneficiary who had made a request.

In his additional submissions, the complainant contends that, in June 2020, the CERN Staff Association issued a press article about the continuing flaws and lack of transparency of the model for calculating the premiums and about the ongoing consultations with the Director-General that will result in a new methodology. According to the

complainant, this demonstrates that CERN's contention that the current methodology is correct is misleading.

16. The numerous arguments underpinning the complainant's second plea are all unfounded.

The Tribunal finds that it was unnecessary for the amended Rules to include the methodology for the calculation of the premium; it was enough that the Rules specified the procedure to determine that methodology.

The Rules stated that where there is no entitlement to a surviving spouse's pension, the beneficiary may acquire such entitlement for her or his spouse by submitting a request, within 180 days of the date of marriage. The corresponding premium for the surviving spouse's pension shall be deducted from her or his retirement pension, under "conditions defined by the Chief Executive Officer in the light of the Actuary's calculations" (Article II 5.09). The restrictive interpretation proposed by the complainant, according to which the "conditions" defined by the CEO solely concern the deduction of the premium from the retirement pension, is unfounded, as it is contradicted by the circumstance that the conditions are established by the CEO "in the light of the Actuary's calculations". If there were only a legal issue concerning the deduction, there would have been no need for the Actuary's calculations. Indeed, these calculations are needed in order to fix the premium. It is true that neither Article II 5.09 nor other provisions of the Rules and Regulations of the Pension Fund directly establish a calculation methodology, but refer to the Actuary's calculations. Nonetheless, the absence of a methodology in the Rules is lawful, since the Rules provide that the methodology to be followed will be adopted in compliance with legal steps outlined in the Rules.

On the one hand, it must be taken into account that a calculation methodology of premiums in a pension scheme is a technical matter, subject to change, that cannot be dealt with once and forever in a law; it is therefore lawful that the Rules do not directly provide for a methodology, but refer to administrative bodies responsible for adopting the methodology.

On the other hand, the Rules do not leave the calculation of the premium to an unfettered discretion of the authorities in charge of the Fund, since they provide for the intervention of the CEO and of the Actuary. The CEO acts under the supervision of the Governing Board, to which he shall be accountable (Article I 2.08). The Actuary acts under the control of the Actuarial and Technical Committee (which operates as the subsidiary and expert body of the Governing Board on actuarial and technical matters), which "define[s] the mandate of the Actuary for the preparation of the periodic actuarial reviews, as well as any documents relating thereto, and monitor[s] the execution of his mandate" (Article I 2.13). The Actuary is appointed by the Governing Board on the proposal of the Actuarial and Technical Committee, and provides actuarial services to the Fund, in particular with respect to the periodic actuarial reviews (Article I 2.16). The Organization pointed out, without being convincingly contradicted by the complainant, that the Actuary used a standardised model based on actuarial principles. It added that after the first calculation, the improvement of the calculation methodology was an appropriate measure once the original model evidenced limitations. The parameters used in the revised model have been reviewed and endorsed by the Fund's Actuarial and Technical Committee and by the Pension Fund Governing Board.

The argument that there is no methodology provided for in the Rules shall, therefore, be dismissed.

17. It is unnecessary to assess whether the complainant was provided with the methodology used for the first calculation of the premium, since this first calculation was not applied. With regard to the second calculation, it is proven that the Organization provided the complainant with the methodology that it had used. The relevant documents were also attached by the Organization to its surrejoinder in the present case.

18. The allegation that the calculation of the premium was "arbitrary" is unsubstantiated. The complainant does not provide evidence of this contention. It is irrelevant that the Organization considered the matter to be "complicated". What is complicated is not necessarily unlawful or arbitrary.

19. Moreover, the alleged arbitrariness cannot be inferred from the fact that the premium was calculated twice with different outcomes, the second of which was much less unfavourable to the complainant. A different methodology was adopted for the second calculation in favour of the complainant, after it had been assessed that the former methodology had overlooked certain factors, and this was not arbitrary but consistent with the Organization's duty of care. The Organization gave the complainant a clear explanation by highlighting that the second calculation considered (i) the fact that a surviving spouse is not entitled to pension if the beneficiary dies within five years of the marriage, and (ii) the potential reduction of the surviving spouse's pension on the basis of Article II 5.07.

20. The further challenges to the methodology are unfounded: it is not proven that the methodology was often changed; only two methodologies have been adopted since 2006. Any deficiencies in the current methodology cannot be inferred from the mere publication of a press article criticizing it, nor from the circumstance that there is an ongoing process aimed at modifying it.

21. Since the adopted methodology was lawful and correct, there is no ground for further investigation into the number of cases in which it was applied, and with what outcome. Consequently, the request for further investigation contained in the complainant's rejoinder is dismissed.

22. The complainant's contention that the Organization should have taken into account his many years of contributions until his retirement while he was still married, is unfounded. It is not clear whether the complainant is claiming that his many years of contributions should exempt him entirely from paying the premium, or whether they should result in a reduction in the amount of the premium. In either case, the contention is unfounded.

The total exemption from the premium would be an acknowledgment of the existence of an acquired right, that has already been excluded.

A reduction of the premium, based on the years of contribution, is not provided for by the Rules applicable to the contributions paid by the complainant as a staff member. Said rules provided for the amount of members' contributions in an identical percentage for all members in the same period, even if calculated on different salaries (Article II 1.07). A reimbursement of the paid contributions is provided for under specific circumstances that do not occur in the present case (see Article II 1.10 regarding the assignment to another pension scheme, and Article II 1.12 regarding the payment of the transfer value). Moreover, the contribution of the staff members to the Pension Fund is calculated in a total amount without a distinction between the part due for the retirement pension and the part due for the surviving spouse's pension. As a result, the contention that the contributions paid by the complainant as staff member should be taken into account in the calculation of the premium is not grounded on the Rules governing the pension scheme. Further, it is in fact not feasible, since it is not possible to identify and quantify the part of the paid contributions attributable to a surviving spouse's pension.

23. The complainant asks that the Tribunal order "the establishment of a mutually agreeable methodology applied by a mutually agreeable and independent [A]ctuary". This request has no legal basis in the applicable rules, which do not provide for an agreed methodology. Nor shall the Tribunal order a new methodology, since the one adopted by CERN does not show factual or legal flaws.

Moreover, it can be inferred from the Tribunal's case law (see Judgment 3538, considerations 11 to 15) that, where the impugned decision is based on the opinion of an expert – as it is, in the present case, the Actuary – the complainants cannot merely submit their divergent analysis in order to refute that opinion. They should rather provide "evidence from authorities of equivalent weight". Only such evidence might potentially be apt to demonstrate the possible flaws in the expert opinion underpinning the impugned decision. In the present case, the complainant's arguments against the methodology adopted by the Actuary are not supported by any expert opinion of equivalent weight.

24. By his third plea, the complainant invokes a breach of good faith and discrimination. CERN, allegedly, did not act in good faith in the calculation of the premium, since the methodology was not transparent and changed twice, and would result in a deprivation of two thirds of the complainant's retirement pension. The complainant argues that beneficiaries who marry after retirement face an illegal discrimination based on marital status. He also submits that the balance of the Fund would not be at risk, because since 2006 there has been an estimated total number of less than five premium requests, to be compared with the around 3,600 beneficiaries of the Fund. In addition, the complainant alleges that he suffered from "a hidden form of pernicious age discrimination".

25. Most of the arguments supporting the third plea are a mere repetition of submissions that the Tribunal has already dealt with in examining the complainant's other pleas. So it is with regard to the submissions concerning the calculation of the premium and the balance between the premium and the viability of the Fund. There is therefore no need for further consideration of these submissions.

Since the Organization adopted a lawful methodology and corrected the calculation in favour of the complainant, the Tribunal is satisfied that it acted in good faith and complied with its duty of care.

26. The sole remaining submission pertains to the alleged discrimination, on the basis of marriage and of age. There is no evidence of discrimination based on age, since the contested Rules on the pension for surviving spouse are applicable to all beneficiaries of the Fund married after retirement, irrespective of their age.

27. There is no evidence of discrimination based on marital status.

Disparity of treatment is unlawful only where equal situations in fact and in law are treated in a different way. The principle of equality requires that persons in the same position in fact and in law must be treated equally (see Judgment 4423, consideration 15). The Tribunal's case law states that allegations of discrimination and unequal treatment

can lead to redress on condition that they are based on precise and proven facts, that establish that discrimination has occurred in the subject case (see Judgment 4238, consideration 5). Discrimination cannot be established unless it is proven that staff members in identical situations were treated differently (see Judgment 4101, consideration 9).

The situation of the beneficiaries of the Fund who get married, or remarried, after retirement, is not equivalent to the situation of beneficiaries who get married before retirement. Similarly, the situation of a person who marries a retired beneficiary of the Fund is not equivalent to the situation of a person who married a member of the Fund before their retirement.

The difference is well explained in the reasons grounding the amendments adopted in 2005, expressed in the 3 November 2005 document, and in the Staff Rules referred to in the said document. The document of 3 November 2005 sets a different level of duty of care of the Organization towards its staff members and their spouses, and towards beneficiaries of the Fund who get married after retirement:

> "[...] the responsibility of an Intergovernmental Organization in pension matters results from the employment relationship which it has with its staff. Where after his or her retirement or departure, a staff member chooses to change the composition of his or her family through marriage (including to a spouse bringing children into the marriage), birth or adoption, the consequences of that decision fall outside the scope of the employer's responsibility.
>
> By contrast, changes in the composition of the family which occur whilst the staff member is employed by the Organization come under its responsibility in terms of pension entitlements.
>
> At CERN, this principle is laid down in Article V 1.03 of the Staff Rules. This Article must be read in conjunction with Article R IV 1.16, which defines the persons making up the family of the member of the personnel. Article V 1.03 inter alia requires the Organization to *'safeguard the members of the family of members of the personnel… against the economic consequences of … the death of the member of the personnel.'* In other words, according to the Staff Rules and Regulations, the family composition recognized for pension purposes should correspond to the situation up to the date of retirement or departure of the member of the personnel."

28. In conclusion, all the submissions of the complainant are unfounded and the complaint shall be dismissed in its entirety.

29. CERN argues that the complaint is an abuse of process as CERN itself had explained in a "tireless" manner the applicable legal framework to the complainant, who nevertheless continued to seek a favourable treatment on the ground of his professional achievements. CERN makes a counterclaim for costs in that respect. This counterclaim shall be dismissed as the complaint is not vexatious and frivolous.

DECISION

For the above reasons,

The complaint is dismissed, as is CERN's counterclaim.

In witness of this judgment, adopted on 19 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ