Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G., H. and D. S. G. (No. 2)

v.

CERN

136th Session **Judgment No. 4707**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. M. G. against the European Organization for Nuclear Research (CERN) on 13 July 2020 and corrected on 14 August, CERN's reply of 7 January 2021, the complainant's rejoinder of 8 April 2021, CERN's surrejoinder of 8 July 2021, the complainant's additional submissions of 9 February 2022 and CERN's final comments of 13 April 2022;

Considering the complaint filed by Mr M. H. against CERN on 3 August 2020 and corrected on 8 September, CERN's reply of 7 January 2021, the complainant's rejoinder of 8 April 2021, CERN's surrejoinder of 8 July 2021, the complainant's additional submissions of 9 February 2022 and CERN's final comments of 13 April 2022;

Considering the second complaint filed by Mr D. D. S. G. against CERN on 8 October 2020, CERN's reply of 25 January 2021, the complainant's rejoinder of 28 April 2021, CERN's surrejoinder of 2 August 2021, the complainant's additional submissions of 9 February 2022 and CERN's final comments of 13 April 2022;

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

Having examined the written submissions;

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

The complainants contest the modifications brought to the subsistence allowance.

In August 2008, Mr G. started working as an associated member of personnel (MPA) of CERN and was granted "User" status. As of 1 August 2019, his Home Institution was an American university. Throughout his association with CERN he has received monthly subsistence allowance payments.

Mr H. started working as an MPA in October 2007 and was also granted "User" status; he also received monthly subsistence allowance payments. At the material time, he had signed a contract of association with the Austrian Academy of Sciences, which signed a Home Institution declaration with CERN. The complainant subsequently changed Home Institution to an American university effective July 2020.

Mr D. S. G. started working as an MPA in 2009. He was granted a "User" status throughout his employment except for the period September 2016 to June 2019 when he was a fellow. His Home Institution was an American laboratory. In December 2019, his contract of association was extended for the period 1 January 2020 to 31 December 2020 with the same Home Institution. Throughout his association with CERN, he has received monthly subsistence allowance payments.

On 17 January 2020, Mr G. and Mr H. each received a document from CERN entitled "Subsistence Claim" stating that the subsistence allowance paid to them for January 2020 was in the amount of 5,184 Swiss francs each. In April 2020, Mr D. S. G. received a similar document from CERN stating that the subsistence allowance paid to him for January 2020 was in the amount of 5,184 Swiss francs.

In March 2020, Mr G. and Mr H. each filed a separate appeal against the decision to reduce the amount of their subsistence allowance from 7,100 Swiss francs and 7,000 Swiss francs respectively to 5,184 Swiss francs. Mr D. S. G. also filed an appeal, but in April 2020, contesting the decision to reduce the amount of his subsistence allowance from 7,070 Swiss francs to 5,184 francs. The three internal appeals were similarly worded. The complainants assumed that the contested decisions were implementing a general decision of 14 October 2019 to

cap the ceiling of the subsistence allowance, which was paid to MPAs and processed from third-party accounts, to 5,163 Swiss francs. They asked that the decision to reduce their subsistence allowance be set aside as unlawful, and to restore the amount they were paid before the contested decisions, adding to this the amount of the cost of living. They alleged, in particular, that the modification of the ceiling was not reasonable, the reasons were not legitimate, the structure of their contract of association was disturbed, the rules applicable to subsistence allowances processed on behalf of third parties were opaque, and the new ceiling violated their acquired rights. In addition, CERN did not uphold the duty of care it owed them. The complainants specifically asked CERN to indicate the rules that applied to them and to provide them with the reasons for applying such rules so that they could verify if their rights were respected. Subsidiarily, they sought acknowledgment that their situation was exceptional and therefore warranted the payment of the allowance in the amount they received in December 2019 as updated based on the cost of living. Mr H. and Mr D. S. G. also claimed payment of interest on the amount to be granted.

On 14 April 2020 and on 5 May 2020, the Director for Finance and Human Resources, acting on behalf of the Director-General, notified Mr G. and Mr H. respectively that their appeals were irreceivable. Indeed, the modifications made to the rules governing the use of third-party accounts did not relate to the conditions governing their contract of association with CERN and, as such, did not impact their rights. These modifications were made explicitly known to the institutes with which CERN collaborated more than two years before they were implemented. The institutes had therefore ample time to put in place suitable measures as necessary. Regarding the rules that applied to the complainants, the Director stated that their respective contract of association and the subsistence claim clearly stated that their status was that of MPAs in the subcategory of "Users". Mr G. and Mr H. respectively impugn the decisions they have received.

Mr D. S. G. was also notified by a decision of 10 July 2020 from the same Director for Finance and Human Resources, acting on behalf of the Director-General, that his appeal was irreceivable. The Director

stated, like he did regarding Mr G. and Mr H., that the modifications made to the rules governing the use of third-party accounts did not relate to the conditions governing the complainant's contract of association with CERN and, as such, did not impact the rights he could assert against CERN. These modifications were made explicitly known to the institutes with which CERN collaborated more than two years before they were implemented. The institutes had therefore ample time to put in place suitable measures as necessary. The Director added that the contested decision had no correlation with the conditions of the complainant's contract of association with CERN and therefore there was no breach of these conditions. He stressed that the processing by CERN of a subsistence allowance on behalf of the complainant's employer did not give rise to an acquired right under CERN's Staff Rules and Regulations. That is the decision Mr D. S. G. impugns before the Tribunal.

The complainants ask the Tribunal to set aside the impugned decision, to order CERN to provide them and the Tribunal with their contract of association, to order CERN to clarify and justify the status applicable to them regarding the subsistence allowance, and to declare null and void the decision applied to them in the contested 2020 subsistence claim according to which "the cap of the subsistence allowance for associated members of personnel associated for the purpose of international collaboration and for the purpose of training has been reduced". They also ask the Tribunal to order that their subsistence allowance be restored to their previous amount, and that CERN pay them the sums improperly deducted, to which should be added the cost-of-living increase together with interest at the rate of 10 per cent calculated from the date on which these sums ought to have been paid until the date of payment. Subsidiarily, the complainants ask the Tribunal to order that their personal situation be acknowledged as exceptional and that consequently the amount of their monthly subsistence allowance be restored to the previous amount in force, to which should be added the cost-of-living increase together with interest at the rate of 10 per cent, calculated from the date on which the amount ought to have been paid until the date of payment. In addition, they seek

moral damages and costs. Mr H. and Mr D. S. G. further seek such other relief as the Tribunal deems just, necessary and fair.

Following the complainants' request to be provided with a copy of their contract of association, CERN provided their latest contract with its replies. In the rejoinder the complainants asked the Tribunal to order CERN to provide "all [their] contracts of association". CERN provided the documents with its surrejoinder.

CERN asks the Tribunal to reject the complaints as irreceivable *ratione materiae* and subsidiarily devoid of merit.

CONSIDERATIONS

1. Three complaints have been filed with the Tribunal commencing proceedings against the European Organization for Nuclear Research (CERN). One was filed on 13 July 2020 by Mr G., the second on 3 August 2020 by Mr H. and the third on 8 October 2020 by Mr D. S. G. Each retained the same lawyer and both the factual circumstances and the legal issues of each are substantially the same. Accordingly, the complaints are joined so that one judgment can be rendered.

2. The complainants request that oral proceedings be held. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to enable the Tribunal to determine their complaints. That application is therefore dismissed.

3. It is convenient to consider first the factual circumstances and legal arguments of Mr G. in isolation though that consideration will inform the resolution of the complaints of Mr H. and Mr D. S. G.

4. This and the following ten considerations concern Mr G.'s complaint. The employment circumstances of the complainant are unusual. At relevant times, he worked at the facilities of CERN. While working there he received what may be described as a monthly subsistence allowance to compensate him for the high cost of living in the Geneva

region (Switzerland). The nomenclature for this payment changed during the period to which this complaint relates but, for present purposes, that change is not relevant. In early 2020, the amount the complainant received by way of subsistence allowance was, it appears, reduced from 7,100 Swiss francs to 5,184 Swiss francs. In these proceedings, he seeks to challenge that reduction. Specifically, he impugns a decision of the Director-General of CERN of 14 April 2020 rejecting his internal appeal concerning this payment, as irreceivable. That appeal was against what appears to have been accepted by both parties, an individual decision ostensibly reducing the subsistence allowance, as just discussed, payable to the complainant Mr G. on and from 1 January 2020. The reduction came about by the imposition of a ceiling of ordinarily 5,163 Swiss francs on subsistence allowances payable to MPAs. As part of the complainant's challenge, he impugns what he characterises as a general decision of 14 October 2019 which underpinned the individual decision applicable to him. CERN does not take issue with this reliance by the complainant on this well-established concept of an individual decision based on a general decision (see, for example, Judgments 4563, consideration 7, and 4435, consideration 4).

5. It is convenient to mention at the outset an issue raised by CERN in its reply, namely the receivability of the complaint. Early in the reply, CERN explains the differing status of personnel deployed at the CERN facility being an international laboratory for research in high-energy physics. One group is personnel composed of employed members (MPEs) and the other are associated members of personnel (MPA). That latter category is constituted by three subcategories. One is associates for the purpose of international collaboration (MPAc), the second is associates for the purpose of exchange of scientists (MPAx) and the third is associates for the purpose of training (MPAt). CERN characterises the complainant as an MPA, and in particular as a MPAc. As such, he is a researcher participating in CERN's scientific projects on behalf of what is described as Home Institution. That might be a university or research institute ordinarily in a country removed from Switzerland where CERN's Headquarters are located (though its facilities extend into France) but with which the MPA has an association. In the

present case, as at late 2019 and early 2020, the complainant's Home Institution was an American university. In its reply CERN states: "[a]dmission of an MPA at CERN requires a legal link between the individual and their Home Institution, which must guarantee their status, financial support and social security. In turn, MPA['s] are linked to CERN by a contract of association under which they take part in CERN's collaborative activities" (emphasis omitted). To that end, there are instruments, as CERN points out, which establish the obligations of CERN and the Home Institution in relation to financial support of an MPA. It is unnecessary to descend into any further detail about the legal arrangements underpinning the deployment of an MPA at CERN. However, the financial or accounting arrangements should be mentioned. In its reply CERN explains that it provides a variety of services including a system of third-party accounts used by Home Institutions to cover ordinary expenses incurred in the course of their participation in CERN's research activities and from which payments are made to individual MPAs including the payment of the subsistence allowance.

6. CERN does not contest that the complainant has personal standing to maintain his complaint. It accepts that the complainant has standing "before the Tribunal in respect of administrative decisions adversely affecting [his] conditions of association" and it refers to Judgment 1166. However, what it does contest concerns the subject matter of the complaint as it is "not related to the Complainant's conditions of association deriving from his contract or from" the Staff Rules and Regulations (SRR). Part of CERN's argument in its reply is that payment of subsistence allowances which are the subject of the ceiling, do not derive from the SRR or an appealable decision of the Director-General of CERN (appealable under Article S VI 1.01 of the SRR), but rather are decided upon by an external entity as the employer of the MPA concerned. The pleas on this topic continue in the rejoinder, surrejoinder, further submissions of the complainant and final comments by CERN. Part of the responsive argument of the complainant is that CERN had not provided any proof that the payments of the subsistence allowance of the complainant had been "decided upon by an external entity".

7. The Tribunal's case law establishes that, generally, a party making an allegation bears the burden of proving it (unless, of course, it is not contested). This approach has relevance in cases where a defendant organization challenges the receivability of a complaint and that challenge is based on a fact or facts bearing upon receivability. Cases have arisen where such challenges have failed because the defendant organization has not proved a fact underpinning the contention that the complaint was not receivable (see, for example, Judgments 3034, consideration 13, and 2494, consideration 4). If a distinction is drawn between the general arrangement whereby CERN made payments on behalf of third parties which is principally a matter of process, and an alteration, particularly a material one, to the amount of any such payment based on a decision of the third party communicated to CERN then proof of that decision may be required to sustain the objection to receivability of the type advanced by CERN. It is not at all obvious, even implicitly, from the material relied upon by CERN that the alteration, by way of reduction, of the subsistence allowance commencing in 2020 payable to the complainant, was ever considered by the complainant's Home Institution, an American university. The absence of evidence leaves open the possibility that, as a matter of fact, the reduction in the payment of the subsistence allowance to the complainant was a direct result of the implementation of the general decision to place a ceiling of ordinarily 5,163 Swiss francs on subsistence payments which did not involve any decision-making or instructions by or from the complainant's Home Institution. But it is unnecessary to explore this issue any further as, for reasons which follow, the complaint should be dismissed on its merits.

8. One plea of the complainant may be disposed of briefly. The decision to reduce the monthly subsistence allowance was based on recommendations made by, amongst others, external auditors. This contention is not in issue and is amply supported both by the documentary evidence and CERN's pleas. However, what is in issue is the complainant's contention there had been a violation of his due process rights, as he has not been provided with a copy of the auditors' report notwithstanding he had requested one. It is not in issue that

CERN has refused to provide a copy. The Tribunal's case law clearly favours the provision of documents to complainants which underpin a decision adversely affecting them (see, for example, Judgment 4412, consideration 14), and asserted confidentiality is ordinarily no barrier to their production. However, in the present case, the difficulty with the argument of the complainant is that in his pleas he does not identify when and in what terms he made the request. In the absence of these details, it is simply not possible to conclude positively that the refusal of CERN to provide him with a copy violated his due process rights. Accordingly, this claim is unfounded and should be rejected.

9. The complainant advances his pleas in his brief under what are, in substance, three headings. The first is that the motive for the reduction of the subsistence allowance was not legitimate and constituted an abuse of authority. The second is that it violated his acquired rights and the third is that it involved a breach of CERN's duty of care.

10. The complainant's argument that the motive for the reduction of the subsistence allowance was not legitimate and constituted an abuse of authority is mainly founded on a memorandum of 4 November 2019 from, it appears, the Head of Finance to the Director-General. The memorandum refers to measures proposed by the Directorate and endorsed by the Enlarged Directorate at its meeting on 14 October 2019. From the memorandum it appears that the latter body endorsed and confirmed the decision of the Directorate to impose the ceiling of 5,163 Swiss francs on the subsistence allowance. The memorandum identified an exception to this general ceiling, but the basis and terms of the exception are not presently relevant.

11. The memorandum commenced with an explanation that it was responsive to recommendations of the Internal Audit on Third-Party Accounts and a notation that the Directorate agreed on a plan of action with three objectives identified in three bullet points. Following those bullet points, the memorandum states: "[a]s the first step in the implementation of this plan, the [Finance and Administrative Processes Department] introduced a maximum amount for subsistence allowances

processed by CERN on behalf of third parties [...] reducing [the] ceiling to 5163 [Swiss francs]/month [...]". The third bullet point identifying the third objective was in these terms: "[e]stablish a plan to cease disbursing payments to individuals outside CERN legislation". On the basis of this statement the complainant submits that "CERN does not want to spend money on individuals outside CERN legislation. The reduction of the cap is actually just one step in the implementation of this plan. Behind the stated goal, reality shows CERN's willingness to push Users out, making the working conditions even more precarious than they already are."

12. In considering this submission, reference should be made to an element of the Tribunal's case law on this general topic of abuse of authority and improper motive. It is that the party asserting abuse of authority and improper motive must prove it (see, for example, Judgments 4427, consideration 2, 4146, consideration 10, and 4081, consideration 19). In the present case, there is ample material showing how the decision to create a ceiling on the subsistence allowance and the quantification of the ceiling emerged. It grew out of a concern, revealed in a memorandum dated 31 August 2017, that the lack of a clear framework for paying subsistence allowances from CERN on its own behalf and on behalf of other institutions, would potentially allow for fraud, de facto employment, employment without proper social conditions and tax evasion. As to the amount, the memorandum said that the amount of the subsistence allowance should be limited to a reasonable amount, "which [should] be sufficient to live in the Geneva area but [should] not be as to be stipulating a salary payment". The memorandum went on to identify the amount, presumably thought to meet these criteria, to be paid from 1 January 2020 to "[a]ssociates for the purpose of international collaboration" as a maximum of 5,128 Swiss francs. While the reasons and the amount might be contestable, it certainly cannot be said that these decisions, and the subsequent implementation in 2020, constitute an abuse of authority or were for an improper purpose. This argument is unfounded and should be rejected.

13. The second argument of the complainant is that the reduction in the subsistence allowance breached his acquired rights. He also argues the imposition of the ceiling had negatively affected the balance of his contractual obligations with CERN though this is really only an element in assessing whether acquired rights have been breached (see, for example, Judgment 2682, consideration 6). It is unnecessary to enter the debate about whether, as CERN argues, the concept of acquired rights has any application at all in circumstances where the person alleging their breach is an associate of CERN as earlier described in these reasons through Article R II 1.11 of the SRR, which provides:

> "In signing a contract with the Organization, members of the personnel shall accept its terms and agree to abide by the Rules and Regulations and to any subsequent amendment thereto by virtue of Articles S I 1.01 and 1.02, without prejudice to their acquired rights.
>
> Employed members of the personnel shall receive a copy of the Rules and Regulations, and associated members of the personnel shall be guaranteed access to them."

That provision clearly supports the view that the concept of acquired rights has an application in such circumstances. That is because the Tribunal has recognised, for example, in Judgment 4465, consideration 10, that:

> "[...] the alteration of a benefit can operate to the detriment of staff and this, of itself, does not constitute the breach of an acquired right. It plainly did operate to the complainant's detriment in the present case. A further element was needed, as discussed in the opening paragraph of the quotation in consideration 7: the complainant must demonstrate that the structure of the employment contract was disturbed or that the modifications impaired a fundamental term of appointment in consideration of which he accepted employment. The complainant has not established, to the Tribunal's satisfaction, that either element exists in the present case in relation to the changes impugned in these proceedings."

And likewise in this case the creation of the ceiling and its amount reducing the subsistence allowance, though substantial, is not demonstrably so significant to justify a conclusion that the "structure of the employment contract" was disturbed or that it impaired a fundamental term of appointment and, additionally, the complainant has not provided

concrete and persuasive evidence that the reduction of the amount had this effect. This argument is unfounded and should be rejected.

14. The third argument of the complainant was that the reduction of the subsistence allowance involved a breach of CERN's duty of care. No point of substance is raised on this count and the pleas merely involve a complaint that the income received by way of subsistence allowance, over a number of years, before the imposition of the ceiling featured in the organisation of his daily life was unfair "considering his commitment to work". This argument is unfounded and should be rejected.

15. In the result, the complainant, Mr G., has not demonstrated that the reduction in the subsistence allowance for him by the creation of a ceiling was unlawful. Accordingly, Mr G.'s complaint should be dismissed.

16. There is no relevant material difference between the circumstances of Mr G. and those of both Mr H. and Mr D. S. G. though their status, by reference to a Home Institution, is not as clear as that of Mr G. But this latter point is not important given the approach of the Tribunal in consideration 6, above. Also, there is, with two qualifications, no material difference between the pleas of Mr G. and those of both Mr H. and Mr D. S. G. Accordingly, for the above reasons and subject to the two qualifications (one which concerns Mr H. and the other Mr D. S. G. and are discussed in the following two considerations) Mr H.'s and Mr D. S. G.'s complaints should also be dismissed.

17. Both Mr G. and Mr D. S. G. were treated as exceptional cases and there was an amelioration, for a period of time, of the application of the ceiling on the subsistence allowance for each of them. Mr H. was not treated in this way, and this founds a plea of unequal treatment (also raised by Mr D. S. G. but not as is applied to him). However, Mr H.'s position was the result of assessment of his role as not critical to the collaboration with which he was involved. This distinguished him from those who were treated as exceptional cases. Thus, he does not

demonstrate his position was identical for the purpose of the application of the principle of equality of treatment (see, for example, Judgment 4596, consideration 13). He did not challenge the legality of the criterion used. This plea should be rejected.

18. As part of his pleas on acquired rights, Mr D. S. G. contends that the ceiling violated "the [principle] of fair remuneration". The existence, source and content of that principle are not explained nor is its application to the facts. This plea should be rejected.

19. Each of the complainants has failed to demonstrate that the determination and application of the ceiling on the subsistence allowance was unlawful and accordingly, their complaints should be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2023, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

CLÉMENT GASCON

DRAŽEN PETROVIĆ