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

FORTY-EIGHTH ORDINARY SESSION

In re ETIENNE

Judgment No. 492

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organization for Nuclear Research (CERN) by Mr. Max Etienne on 10 July 1981 and brought into conformity with the Rules of Court on 22 July, CERN's reply of 31 October, the complainant's rejoinder of 25 January 1982 and CERN's surrejoinder of 30 March 1982:

Considering the applications to intervene filed by:

Mr. Henry von Arx,

Mr. Georges Grossetête,

Mr. Gino Gurrieri,

Mr. Gilbert Prodon,

Mr. Georges Roiron;

Considering CERN's replies of 31 October 1981 to each of these applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05 and Rules II 1.05, III 1.01 and 1.03 of the CERN Staff Rules and Regulations of 1968 and Regulations II 1.17 and VIII 2.06 of the Staff Rules and Regulations of 1980;

Having examined the written evidence and considering unnecessary the oral proceedings suggested by the complainant;

Considering that the material facts of the case are as follows:

A. On 21 March 1980 the Chief of Personnel of CERN informed all members of the staff holding a contract prescribing a working week in excess of 40 hours that, in accordance with the decisions of the CERN Council, contractual hours were to be reduced with effect from 1 April 1980 to 40 a week. In return, and in accordance with Regulation VIII 2.06 of the Staff Rules and Regulations which came into force in 1980, it was decided to grant those staff members (a) special personal allowances by way of compensation for reduction in income, and (b) additional contributions to be paid by CERN to the pension fund. The complainant joined the staff on 17 December 1968 at grade 5 under a contract dated 29 October 1968 which expressly prescribed a 44-hour week. He was transferred to a division known as "TC" in 1969 and promoted to grade 6 in 1970. On 27 April 1970 his contract was amended to reduce his weekly hours to 40 with effect from 1 April 1970. In fact he continued to work 44 hours a week, and it was not until June 1976 that they were reduced to 40, with a salary cut of some 225 Swiss francs a month. On 13 May 1980 he applied for the payment of the additional contributions by CERN to the pension fund. The claim was refused on 28 May, and on 26 June he addressed an appeal to the Director-General. His appeal was referred to the Joint Advisory Appeals Board, which, in its report of 30 March 1981, unanimously recommended that it be allowed. On 14 April 1981 the Director of Administration rejected the appeal on behalf of the Director-General, and that is the decision now impugned.

B. The complainant submits that the two forms of compensation do not form a whole, but are fundamentally different in character. The purpose of the special personal allowance is to maintain salary at the level at which it stood before 1 April 1980, and is therefore, the complainant concedes, payable only, to those, unlike himself, who were actually working more than 40 hours a week up to that date. But the payment of additional contributions to

the pension fund is, as the Appeals Board observed, retroactive in effect, the purpose being to benefit any staff members who, in the course of their employment with CERN, have for any period been on a 44-hour week: in other words, it is recognition of the additional services they have provided at some time in the past. Prom December 1968 until May 1976 the complainant actually worked 44 hours a week, and he should therefore receive the same treatment as those who have been granted the additional pension fund contributions. There is no reason why he should be denied the benefit because he ceased to work a 44-hour week before 1 April 1980. He accordingly alleges breach of the principle of equality of treatment. He invites the Tribunal to quash the decision of 14 April 1981, to declare that he is entitled to the payment by CERN of additional contributions to the pension fund for the period during which he actually worked 44 hours a week, and to award him costs.

C. In its reply CERN discusses the Staff Rules and Regulations which came into force in 1968 and which were applicable when the contract was concluded with the complainant. It refers in particular to Regulations II 1.06 and 1.07, III 1.01, 1.02, 1.03 and 1.05, Rules II 1.05, III 1.01 and 1.03. It observes that later editions of the Staff Rules and Regulations carried over those articles from the 1968 edition, except that in the 1980 edition the article which had provided for contracts prescribing more than 40 hours a week - Regulation III 1.05 - was repealed, and a new Regulation, VIII 2.06, authorises the Director-General to "take the necessary steps to ensure that the income of those members of the personnel who accept a reduction in their hours of work is not thereby reduced". The complainant's contract expressly provided, however, that his working week should be 40 hours, and accordingly Regulation VIII 2.06 did not apply to him. There is no breach of the principle of equal treatment since neither in fact nor in law is the complainant in the same position as those who received the form of compensation he claims: not in fact, because from June 1976 to March 1980 he was on a 40-hour week, and not in law, because since 1970 he had not held a contract prescribing more than 40 hours a week. CERN also rejects the argument that the two forms of compensation are fundamentally different. In fact they form an indivisible whole; both are based on Regulation VIII 2.06 and both are designed to preserve the acquired rights of those who on 30 March 1980 held contracts prescribing over 40 hours a week. The latter have obtained the additional pension fund contributions not because of additional services rendered in the past but because they have voluntarily surrendered contractual rights. CERN accordingly invites the Tribunal to dismiss the complaint as unfounded.

D. In his rejoinder the complainant develops his argument that the purpose of making the additional pension fund contributions is to benefit certain staff members because of previous services to the Organization, and to do so without any limit of time. He is admittedly not in the same position as those who have benefited from the two forms of compensation: that indeed is why he is not claiming the award of the special allowances. The difference in circumstances is no reason, however, for not applying the principle of equal treatment in respect of the other form of compensation.

E. In its surrejoinder CERN again contends that the complainant is not entitled to any of the compensatory measures since he did not qualify at the date on which the revised rules came into force. The compensatory measures are indivisible and are not retroactive, and the fact that past services are taken into account does not alter their legal character. The Organization again urges the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. The Staff Rules and Regulations of CERN which came into force on 1 January 1968 stated: "the basic working week shall be a 40-hour, five-day week", and that "Every appointment shall be recorded in a contract setting out the conditions of employment"; "The contract shall indicate: ... the actual length of the working week, if this differs from the basic working week"; and "Any change in the conditions indicated above shall require an amendment accepted by both parties".

Those were the rules which applied when the complainant was appointed to the staff under a contract dated 29 October 1968. The contract provided that he should be employed as a mechanic and one of the special terms was that he should work a 44-hour week.

A year and a half later, on 27 April 1970, there was an amendment to the original contract granting him promotion and reducing his hours to 40. In fact he continued to work 44 hours a week, and it was not until June 1976 that they were reduced to 40, his pay being at the same time appreciably reduced.

2. For reasons of general policy and after consulting holders of contracts prescribing over 40 hours, the Organization decided in 1980 to reduce contractual hours to 40. The Chief of the Personnel Division proposed to

the holders of such contracts a new clause to that effect which provided for compensation.

The complainant's contract stipulated only 40 hours a week, and no amendment to his contract was proposed.

The compensation offered to holders of contracts prescribing a 44-hour week took two forms. First, they were to receive special personal allowances amounting to 83 Swiss francs a month, to be gradually scaled down. Secondly, the period of their membership of the pension fund was to be increased by the purchase under article 12 of the Fund rules of one-tenth of one year of membership for each full year during which they had been on a 44-hour week.

3. The complainant acknowledges that he is not entitled to the special allowance intended to make up for loss of salary, its purpose being to keep salaries at the figure at which they stood before 1 April 1980. Staff who at the material date were working only 40 hours a week do not qualify.

The complainant's argument is, however, that the payment of additional annuities to the pension fund is retroactive in effect and to the benefit of anyone who at some time in the course of his employment with CERN has been on a 44-hour week. The claim which the complainant submitted to the Personnel Division was rejected on 28 May 1980, and he filed an appeal on 26 June 1980. The case went before the Joint Advisory Appeals Board, and the Board unanimously recommended that the Director-General should allow the appeal. But the Director of Administration rejected it on 14 April 1981, and that is the decision now impugned.

4. The purpose of the action taken in 1980 to put the whole staff on a 40-hour week was to do away with unaccountable variations in their contracts. But one obstacle in the way of reform is the notion of acquired rights, and it is a notion by which employees set great store. In the present instance there were lengthy negotiations before the two sides reached a compromise.

In proposing compensatory measures the Organization was at pains to put the reform on a legal basis. New Staff Rules and Regulations accordingly came into effect on 1 April 1980, and one of the articles states: "The Director-General may take the necessary steps to ensure that the income of those members of the personnel who accept a reduction in their contractual hours of work is not thereby reduced."

There can be no doubt that the article provided for the grant of a special compensatory allowance to staff who under the contracts they held at the time were on a 44-hour week.

5. It is more difficult to affirm with certainty that it provided for the purchase by CERN of additional years of membership of the pension fund. Such a measure does not have the immediate effect of ensuring that income is not reduced: it has effects only when the official leaves. Rules on pensions are objective in character: they take account of conditions of employment and should be identical for all who are in the same circumstances. The complainant's case is that someone who in any particular year - say, 1970 - held a contract prescribing 44 hours but who before 1980 was actually working only 40 hours a week is, in respect of 1970, in the same position as someone who up to 1 April 1980 held a contract prescribing 44 hours.

The argument does carry some weight. Yet it must fail, since what he alleges is a breach of the principle of equality which can be due only to the amendment of the Staff Rules and Regulations in 1980. The text does refer only to reduction in "income", viz. the salary being paid at the time when hours of work were reduced; but to limit the rule in that way would be to construe it too narrowly. From the date on which an official ceases to work 44 hours a week the contributions towards his pension are reduced, and so, accordingly, will be his actual pension. Of course the compensatory measure fulfils its intended purpose only in part since the reduction in contributions subsequent to 1 April 1980 is made good by the payment of allowances for services rendered before that date. This is an anomaly, and the complainant's argument that the measure is retroactive is understandable. But he is confusing the effect - which may in any event produce unfair results - with the purpose, which is to provide compensation not only for loss of income during employment but also for a reduction in the pension to be paid later.

The compensatory measures constitute a whole and have to be applied as such and, moreover - as indeed appears from the Staff Rules and Regulations which came into force on 1 April 1980 -only to those whose contracts, as in force on that date, prescribed over 40 hours a week. That was not the complainant's position, and his complaint must therefore fail.

The applications to intervene by Mr. von Arx, Mr. G rossetête, Mr. Gurrieri, Mr. Prodon and Mr. Roiron

6. Since the complaint is dismissed, so too are the applications to intervene, and there is no need to consider their receivability.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.