

SEVENTY-SEVENTH SESSION

***In re* GUYEN**

Judgment 1354

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antoine Guyen against the European Organization for Nuclear Research (CERN) on 1 June 1993, CERN's reply of 27 September, the complainant's rejoinder of 30 November 1993 and the Organization's surrejoinder of 3 February 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rule 2.03 and Regulations R II 2.05 and R II 2.07 of the CERN Staff Rules and Regulations and paragraphs 4, 9 and 14 of the Organization's "Instructions for the designation of career paths to present staff members";

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a French citizen who was born in 1937, joined CERN on 1 March 1975 as a laboratory technician at grade 7, step O. On 1 March 1978 CERN gave him an indefinite appointment. It granted him a step increase every year and the highest step - 13 - in his grade in 1988. There he stayed until 1 July 1991, when he was promoted to grade 8, step 5, on reclassification of his post. He is now at step 7 in grade 8.

On 1 August 1991 CERN introduced a new scheme for career advancement whereby every established staff member follows a "career path" comprising several grades and steps. Advancement within the career path depends on the assessment of performance in yearly reports.

The scheme was to come in in several stages. At the end of the first the Personnel Division put the complainant provisionally on career path V. At the next, on the basis of the definition of the new career paths and "Instructions for the designation of career paths to present staff members", the leader of the complainant's division confirmed after consulting the leader of his group that his duties matched career path V.

At an interview which the Instructions required and which took place on 5 November 1991 his group leader told him of the division leader's decision. The complainant said he disagreed.

By a letter of 14 February 1992 the leader of the Personnel Division, with the Director-General's approval, informed the complainant that he was putting him on path V from 1 March 1992.

By a letter of 7 April 1992 to the Director-General the complainant filed an internal appeal with the Joint Advisory Appeals Board against the decision of 14 February and asked for assignment to path VI and "professional rehabilitation".

According to a report dated October 1992 the Board endorsed the Administration's decision to assign him to path V.

By a letter of 3 March 1993, the impugned decision, the Director-General told the complainant that on the Board's recommendation he was rejecting his claim to assignment to path VI.

B. The complainant contends first that CERN treated him unfairly. Although the reports on his performance had been good it did not promote him from grade 7 to grade 8 until 16 years after recruitment, whereas most officials are promoted after only 8 years' service. Nor did he get any personal salary increase before promotion to grade 8.

Secondly, he considers that CERN failed to take proper account of paragraph 4 of the Instructions, which stipulates

that if it is to serve as an incentive the career path must be carefully chosen. If the choice is seen to be unfair, arbitrary or unlikely to offer reasonable prospects to dedicated and hardworking staff it may prove a serious disincentive. The complainant cites the case of another official, with the same duties and experience as he, who is on a grade 9 post and path VI. He asks to see the statistics of staff advancement in order to compare his own situation with that of other officials.

Thirdly, he asserts that his outlook is "uncertain and unpromising" since all he can look forward to is a proposal for placement in another career path or seven years in career path V until he reaches grade 8 step 13. Although in the latter case he might get exceptional advancement in grade and that may sound "alluring", such advancement is not such a good thing towards the end of a career since it brings a step increase only every other year.

Lastly, he submits that the Organization discriminated against him because of his age, which was 55. Although paragraph 14 of the Instructions says that grade 8 staff are to be put provisionally on path VI "where that grade was attained at or below age 38", CERN stated in the internal proceedings that it took account of age only on provisional placement. If so the complainant, who was on a grade 8 post at the material time, should have been put ipso facto on path VI.

He asks the Tribunal to quash the Director-General's decision of 3 March 1993, order CERN to review his assignment and put him on path VI, and grant him "professional rehabilitation" in the form of ten annual step increments.

C. CERN replies that the complainant has failed to show breach of his contract of appointment or the material rules or to explain how it has misapplied paragraph 4 of the Instructions, which in any case serves only for "general consideration", not as a directly applicable rule.

He adduces not a shred of evidence to show that he has the same duties or qualifies for the same career path as the other official.

How can he describe his outlook as "uncertain and unpromising"? Quite apart from the possibility of changing career paths under Rule II 2.03 and Regulation R II 2.07, path V offers the prospect of advancement in his present grade by eight steps and then of the exceptional advancement in grade allowed under Regulation R II 2.05.

In line with the Instructions the criterion of age was applied only in the provisional determination of the complainant's career path. At the later stages CERN took the view that he failed to qualify for path VI.

His main claim and his claim to "professional rehabilitation" are groundless.

D. In his rejoinder the complainant recounts incidents that occurred in 1987 as evidence in support of allegations of personal prejudice on the part of his supervisors in his first 12 years' service. Discrimination against him delayed promotion until 1991. Had his career gone unimpeded he would by now have advanced beyond grade 8 and the Organization would have had to put him on path VI.

The introduction of the new career system amounts to variation of his contract of appointment, disrupts his conditions of service and so warrants compensation. He presses his pleas.

E. In its surrejoinder the Organization maintains that putting the complainant on path V squares with the rules. Citing Judgment 111 (in re Jurado Nos. 12 and 13) it observes that a complainant may not "refer to the courts in a single complaint two or more different decisions having no connection with each other". The complainant's claim to "professional rehabilitation", which he rests on incidents prior to the impugned decision, is therefore irreceivable. Furthermore, since he shows no link between the damages he seeks under this head and CERN's allegedly unfair treatment of him, what he is claiming is not quantifiable.

He offers no evidence of any discrepancy between his performance and his grade and has never lodged an internal appeal against his grade.

Lastly, the new scheme for advancement has not harmed his interests but greatly broadened his career prospects.

CONSIDERATIONS:

1. The complainant joined CERN on 1 March 1975 at the age of thirty-eight as a laboratory technician (electronics) at grade 7. On 1 March 1978 he got an indefinite appointment. In 1991 he was promoted to grade 8, step 5, and because of annual step increments he is now at step 7. On 1 August 1991 CERN brought in a new system of advancement by "career path". The Personnel Division put the complainant in category 3 and provisionally on career path V. His own division having endorsed that career path, the leader of the Personnel Division proposed putting him on it as from 1 March 1992 and, with the Director-General's agreement, informed him in a letter of 14 February 1992 that it had been so decided. He lodged an appeal but on the recommendation of the Joint Advisory Appeals Board the Director-General rejected it on 3 March 1993. That is the decision he is challenging.

Receivability

2. CERN pleads that the complaint is irreceivable insofar as the complainant is claiming "professional rehabilitation". In its submission that claim and the decision to put him on path V do not have the same basis. What he wants is damages for the allegedly unfair treatment of him throughout much of his career. That, says the Organization, is a separate claim and one that should have formed the subject of a separate decision.

3. The plea fails. The impugned decision of 3 March 1993 was a reply to the internal appeal the complainant made on 7 April 1992. There were two heads of claim in that appeal. One was about assignment to path V and the other about professional rehabilitation. In rejecting the appeal the Director-General not only endorsed the Board's recommendation about the matter of his career path but also by implication rejected his claim to "professional rehabilitation". Though the impugned decision answers two separate claims it is still a single decision and he may challenge it in a single complaint.

The merits

4. He puts forward several pleas in support of his claim to the quashing of the decision to put him on path V. In his submission CERN misapplied the criteria in the rules; it was in breach of the principle of equal treatment; it based the decision solely on the criterion of age; it took account only of his grade - 8 - in choosing his career path and disregarded the good reports on his performance; and the procedure it followed was not adversarial.

5. As to the application of the prescribed criteria, he is wrong to claim path VI on the strength of his present duties and acknowledged potential. He fails to show any fatal flaw in the decision. On 3 October 1991 the Organization issued Instructions for the designation of career paths to present staff members. Paragraph 9 of the Instructions sets out the stages of the procedure. Professional abilities are to be recognised in the Director-General's exercise of his discretion to determine the right career path and that decision is subject only to limited review by the Tribunal. The complainant fails to identify any flaw which there might have been at some stage in the prescribed procedure. He merely speaks in vague and general terms of misapplication of the criteria. His plea under this head therefore fails.

6. In support of his plea of breach of equal treatment he cites only one case, though he says there must be many others he is unaware of. That there may be such other cases is mere idle speculation. As for the case he does cite, the official is at grade 9, whereas the complainant's grade is 8. Since the principle of equality means treating alike only those who are in like case, his plea fails.

7. Also mistaken is his argument that his age was the only reason for putting him on a lower career path than he deserved. His age counted only for the purpose of provisional determination of his career path. Section 14 of the Instructions of 3 October 1991 reads:

"Staff in Categories 3 and 5b will be placed in career paths IV, V or VI according to the following instructions:

Provisional designation:

...

Career path V ...:

...

- Staff in job grade 8 where that grade was attained after age 38 ...".

It is common ground that the complainant was in category 3 and had been in grade 8 since 1 July 1991, when he was well over the age of 38. Besides there is no evidence to suggest that after the divisions involved in the various stages of the procedure had agreed to the provisional career path age carried any weight in the Director-General's final decision.

8. He further objects to CERN's relying on his grade 8 to put him on path V and disregarding his "altogether flattering references" and "fine" performance reports. The plea is irreceivable since it amounts to challenging his promotion to grade 8, a decision he has never demurred at in an internal appeal and which has therefore become final.

9. He submits that the procedure for determining his career path ought to have been adversarial. That is a stricture in general terms that fails to square with his statement in his rejoinder that he submitted "comments" to his division "objecting to the provisional determination" of career path. Moreover, the evidence shows that he saw his group leader on 5 November 1991. In any event both his internal appeal and the present proceedings have afforded him ample opportunity to plead his case. So there is no question of any breach of his right to due process.

10. Lastly, his claim to what he calls "professional rehabilitation" rests mainly on his allegation that promotion was long in coming because a former group leader blocked his career for years. The claim fails for the same reasons as those set out in 8 above. He may not now raise any objection to a promotion which he has not challenged by timely internal appeal.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
P. Pescatore
A.B. Gardner