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

EIGHTY-FIRST SESSION

In re AYMON (No. 2), BALL (No. 3) and BORGHINI (No. 3)

(Application for execution)

Judgment 1514

THE ADMINISTRATIVE TRIBUNAL,

Considering the common application filed by Mr. Marcel Aymon, Mr. Derek Ball and Mr. Michel Borghini on 13 June 1995 for the execution of Judgment 1368, the reply of 5 October from the European Organization for Nuclear Research (CERN), the complainants' rejoinder of 11 December 1995 and CERN's surrejoinder of 12 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1.In Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2) of 13 July 1994 the Tribunal allowed earlier complaints by the present complainants, who are all officials at CERN, challenging their pay slips for January 1993. The Tribunal held that CERN had failed to set scales of staff pay by a decision of the Organization's Council, as Staff Rule IV 1.01 required. It sent the case back "for the setting of the complainants' pay ... on the strength of lawfully determined scales".

2.The complainants are applying for execution of the judgment on the grounds that the decision that the Council took on 16 December 1994 to raise staff pay for 1993 by 2.46 per cent failed to comply with the Tribunal's order.

3.CERN replies that their complaint is no application for execution and that they were not free to appeal directly to the Tribunal against decisions on pay before they had exhausted their internal remedies. What they are impugning, in CERN's submission, is new decisions and some of the procedural and substantive flaws they plead are irrelevant to the execution of Judgment 1368.

4.That objection to receivability fails. Judgment 1368 required CERN to set the complainants' pay "on the strength of lawfully determined scales". So what it had to do was not just take new decisions untainted with the flaw the Tribunal had found but apply all the other material, procedural and substantive rules, which, having set aside the impugned decisions on the grounds of that flaw alone, the Tribunal had had no need to comment on. So any objections to the lawfulness of the decisions taken in compliance with the duty to set pay as ordered have a bearing on the execution of the judgment. And, as is plain from the case law - see, for example Judgments 732 (in re Loroch No. 3) and 1328 (in re Bluske No. 3) - the complainants did not have to go through the internal appeal procedure before coming back to the Tribunal.

5.CERN raises the further objection that the complaint is time-barred for having been lodged over ninety days after notification to the complainants, on 25 January 1995, of the challenged decisions in their pay slips for that month. But those pay slips said nothing of the corrections which CERN had made in the figures of their pay for 1993 in pursuance with the Council's decision to endorse the proposal of a 2.46 per cent rise in pay. The complainants had no reason to infer from the omission that the time limit would start at the date at which they received the pay slips. On 25 January 1995 they asked the Director-General to give them notice of the effects that the Council's decision of 16 December 1994 might have on their pay. At the end of a letter of reply dated 15 March 1995 he said:

"In execution of the Tribunal's judgment cited above I wish to inform you that your basic salary will be subject to a rise of 2.46 per cent as from 1 January 1993."

That is the decision that the complainants are impugning in this complaint, which they lodged on 13 June 1995 and which is fully receivable.

6.They have two main arguments on the merits. One is that on 16 December 1994 the Council merely endorsed, without inquiry, the decisions that the Director-General had taken earlier and that the Tribunal had set aside. Their other argument is that the Council's decision of 1992, which affords the basis for the individual ones under challenge, shows the same flaws as before, and that the Tribunal has not yet ruled on those flaws, namely, breach of their acquired rights in the serious financial injury they have sustained, and CERN's misapplying the method it had a duty to follow.

7.Judgments 1329 (in re Ball and Borghini) and 1368 explain the procedure for the setting and periodic review of pay at CERN. Staff Rule IV 1.01 says that "The remuneration scales shall be determined and periodically reviewed by the Council", and the Council takes as a "guide" for the purpose movements in the cost of living at Geneva and variations in pay in the department of public utilities of Geneva or the Swiss federal public service.

8.The complainants say that the Council held a debate on 16 December 1994 on the consequences of Judgment 1368; it then chose not to resume the procedure for the adjustment of pay; neither the Finance Committee nor the Council heeded the cost-of-living index, which ought to have been a criterion; and the Council based the pay scales on a budget adopted in 1992 and thereby made an improper exercise of its authority.

9.The plea does not succeed. A fortnight before the Finance Committee's meeting of 28 September 1994 its members got a paper setting out the Tribunal's ruling and saying that their recommendation to the Council should be based on the cost index for 1993 that had been circulated at the time. After a short debate the Committee took note of the paper and unanimously recommended an "increase in salary indexed at 2.46 per cent for 1993". The Council had the same paper before it and endorsed the recommendation. In so doing it did not act in breach of the obligation that Judgment 1368 had laid on it. It approved the rise in pay on the strength of material that cited the relevant criteria. Though it is odd that there was seemingly no discussion of the actual figure of 2.46 per cent there had been such discussion already, in 1992, and so delegates were free to regard further debate as needless. In any event the Tribunal is satisfied on the evidence that neither Committee nor Council treated the earlier conclusions as binding. On that score there was no mistake of law.

10.Again, in putting the rise in pay at the rate already determined by the Director-General the competent bodies took the approved figures of the staff budget for 1993. But, as CERN points out in its reply, the Council would as its sovereign authority have been free to alter the rate by amending the staff budget had it wanted to.

11.The complainants argue that even supposing that the challenged measure does not offend against res judicata it shows the same flaws as those which they pointed out in their first complaint but which the Tribunal did not then rule on: breach of acquired rights and misapplication of the methodology the Council adopted in 1979.

12.As first set out in Judgment 986 (in re Ayoub No. 2 and others) and reaffirmed in Judgment 1368, the case law is that international officials may allege breach of an acquired right when there is impairment of an essential and fundamental term of conditions of employment; and that is so even where impairment is gradual and due to an accretion of final decisions which are no longer open to challenge and each of which, taken singly, would not itself have been deemed unlawful. The complainants put their cumulative loss at some 10 per cent of the purchasing power of their pay since 1990 - a figure that CERN contests - and say it impairs an essential term of employment. A fall in purchasing power below some critical point may indeed be breach of an official's acquired right. But, save where the written rules require the indexing of pay, not every financial setback the official may suffer will amount to such breach. As was held in Judgment 832:

"... there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost- of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted."

13.The Tribunal is satisfied on the evidence that there was no breach of any essential term of employment in CERN's failing, on the grounds of the "economic and financial situation" in its member States, to take full account of trends in the cost of living over several years.

14.But is CERN under a duty to index yearly pay rises? The complainants rely on what they describe as "binding"

features of the methodology adopted in 1979 for the yearly review of basic pay scales. According to that methodology pay is to keep pace with the cost of living in Geneva - so as to maintain the purchasing power of agreed levels of pay - and with the net take-home pay certain groups of employees in Switzerland that have been taken for the sake of comparison. The complainants argue that alignment with the cost of living is compulsory because the methodology uses the imperative "shall" whereas, as to the take-home pay of Swiss employees, the process of adjustment is seen as allowing some leeway because the term used is the less binding "should".

15.Ambiguous though the wording may be, the plea fails. The only formal obligation the Council has is in Regulation R IV 1.01:

"When reviewing remuneration, the Council shall use as a guide an index, the composition and method of calculation of which it shall determine."

As Judgments 1329 and 1368 said, there is no obligation in law to align with the cost of living or with take-home pay. Though CERN must work out the pay rises fairly and objectively, with due regard to the relevant components, the methodology puts it under no obligation to match pay rises to trends in the cost of living in Geneva. That would be tantamount to indexing, and the rules do not require it.

16.The conclusion is that, no wrong arithmetic being alleged, CERN has not acted in breach of the applicable methodology. Nor indeed is there any evidence of failure to discharge the duty of fairness and good faith it owes its staff.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner

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