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

EIGHTY-SIXTH SESSION

In re Aymon (No.4), Borghini (No.5) and Vitasse

Judgment 1791

The Administrative Tribunal,

Considering the fourth complaint filed by Mr. Marcel Aymon, the fifth filed by Mr. Michel Borghini and the one filed by Mr. Michel Vitasse against the European Organization for Nuclear Research (CERN) on 18 August 1997 and corrected on 19 November 1997, CERN's replies of 23 March 1998, the complainant's rejoinders of 6 July and the Organization's surrejoinders of 14 October 1998;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. In December 1994 the Council of CERN decided to build a large hadron collider (LHC). In approving the project it had before it estimates of the Organization's budgets from 1995 to 2008.

In mid-1996 the Government of Germany announced that it would be contributing less to CERN in 1997-2000 because of unexpected cuts in its own federal budget. That prompted debate in the Finance Committee and the Committee of Council. The upshot was a decision, not to make special arrangements just for Germany, but to reduce all contributions because all member States were in financial straits, save that the collider project was not to suffer on that account.

In a letter of 13 November 1996 the Director-General announced that most member States wanted to spend less on staff; management was to make proposals for cutting the staff budget by up to 2 per cent as from 1 January 1997; but he hoped that measures that would heed suggestions from the Staff Association might help the Organization to get through.

The Staff Association had drawn up a set of proposals and put them to the Standing Concertation Committee for a "time off purchase and savings" plan and for progressive retirement, both to be voluntary.

Management held meetings in November 1996 with representatives of the Association. On the 26th it put to a body known as the Tripartite Employment Conditions Forum (TREF) proposals for progressive retirement and for cuts in take-home pay against time off to be taken later. The Association would not hear of compulsory measures, the representatives of member States in TREF approved of the proposals.

On 18 December the Finance Committee decided on a set of recommendations to the Council: take-home pay was to be cut in return for time off to be taken later; the cut would be partly compulsory, in an amount equivalent to 2.5 per cent of basic pay in 1997, and partly voluntary, over a longer period; and a programme of progressive retirement should start on 1 April 1997.

On 19 December 1996 the Committee of Council endorsed the Finance Committee's recommendation on the staff budget and decided to recommend to the Council a resolution to that effect. The Council adopted the resolution the next day.

By a letter of 16 January 1997 the Director-General told the staff of the Council's decision of December to reduce the contributions of member States.

In January 1997 CERN applied the 2.5 per cent "crisis levy" to staff pay and so informed the staff in pay slips dated the 24th.

On 7 February Mr. Borghini appealed against the Council's decision of 20 December 1996 to apply the crisis levy, and Mr. Aymon and Mr. Vitasse followed suit on 10 February.

In a letter of 22 May 1997 - the impugned decision - and another of 20 June the Director-General said that since their case rested on a decision by the Council internal appeals were not advisable and he gave them leave to go straight to the Tribunal.

B. The complainants have four pleas.

The impugned decision is unlawful because CERN gave the wrong reasons and drew blatantly wrong conclusions from the evidence. Germany was the only member State to have pleaded an economic crisis warranting cuts in the staff budget. The reason why it had sought a reduction in its contribution was not financial constraint but its resolve to close the gap, as to pay especially, between international civil servants and national ones. CERN's finances were not so shaky as to warrant imposing cuts in pay.

The impugned decision amounts to breach of the independence of the international civil service. CERN bowed to the wishes of a single member State and fell in with a national policy actuated by nothing but national interests. So much is plain from a report of 10 March 1997 by the German Ministry of Finance.

The decision also shows abuse of authority: CERN made no attempt to find some way of leaving contractual pay alone. Contrary to what it has let on, it did not even look into the possibility of voluntary action.

The impugned decision is in breach of the complainants' acquired rights. Citing precedent, they contend that their contracts, particularly the clauses on pay, are inviolate. Amendment without their consent was in breach of contract.

The 2.5 per cent cut broke their right to a steady level of pay. The result is a cumulative reduction in purchasing power of 11.6 per cent for Mr. Aymon, 31.2 for Mr. Borghini and 25.6 for Mr. Vitasse.

Lastly, they submit that the Organization disregarded the Noblemaire principle (see Judgment 825 *in re* Beattie and Sheeran).

They seek the quashing of the Director-General's decision of 22 May 1997 and costs.

C. In its replies CERN rebuts all their pleas.

The impugned decision did not rest on mistaken grounds or on mistaken findings of fact. The Organization's finances were in serious trouble: only two years after approving the collider project member States were reviewing the budget for it and demanding heavy cuts.

Although Germany was the first officially to plead shortage of money, most member States were feeling the pinch.

The assertion that Germany wanted CERN staff to earn less does not stand up: the cuts demanded and made in the budget as a whole are much higher than the 2 per cent cut in expenditure on the staff.

There was no escaping the levy: unspent monies had since 1994 been put in the "LHC reserve".

The impugned decision is quite in keeping with the independence of the international civil service. The levy was decided on unanimously by the Council, CERN's sovereign body, to which the Director-General is accountable and subordinate in law. The report of the German Ministry of Finance afforded neither the basis in law nor the reason for the decision. CERN did not overstep its authority: the levy was the best expedient and management never made out that it had looked into schemes for which the staff might volunteer.

Nor does the decision impair the complainants' acquired rights. It is not in breach of their contracts. It was just an ad hoc expedient resorted to in an emergency. It applied for only one year, was offset by additional leave and did not affect basic pay, allowances or social benefits. Besides, as was said in Judgment 391 (*in re* de Los Cobos and Wenger), an unforeseen event beyond the control of the parties may be tantamount to *force majeure* and warrant

unilateral amendment of employment contracts by an organisation. That is just what happened at CERN late in 1996 and what brought about the levy.

There was no breach of the complainants' acquired right to a steady level of pay: the losses they say they have suffered are "sheer make-believe", and citing Noblemaire makes no sense.

D. The complainants rejoin that CERN makes a mistake of fact in describing the Director-General as subordinate to the Council: he has invariably made proposals before getting instructions from it. It also makes a mistake of law in that there is nothing to stop him from taking a stand against any decision he deems unlawful.

CERN did mislead them. It made, not the promised inquiry into what could be done, but a dubious assessment of what they wanted, and it did not even ask them. That was deplorably remiss.

It is to their mind astonishing that CERN should plead *force majeure* to excuse the breach of contract. It has failed to show that it could not otherwise get out of its predicament.

E. In its surrejoinders CERN objects that the complainants are meddling in the management of its finances.

It did go into things properly. What the complainants are bitter about is that the outcome was not the one they wanted. But in concluding that there was a need for the levy management was just using its prerogative.

CERN has been relying, not on *force majeure* but on "exceptional circumstances", a notion well known to administrative law.

CONSIDERATIONS

1. The complainants are employees of the European Organization for Nuclear Research. Mr. Aymon has had a permanent appointment since 1 October 1984, Mr. Borghini since 1 October 1968 and Mr. Vitasse since 1 July 1997.

2. On 20 December 1996 the Council of CERN unanimously adopted a resolution on the budget for staffing in 1997. It reads:

"THE COUNCIL

Considering

the substantial economic and financial difficulties currently prevailing in Europe and their impact on the capacity of CERN's Member States to finance the Organization's activities;

Considering

that the savings already achieved leave no further room for a significant reduction in the Organization's materials budget without jeopardising CERN's activities and that there is therefore occasion, on the one hand, to call upon the staff of the Organization to make an effort that would make it possible to limit the aforementioned financial difficulties for 1997 and, on the other, to examine suitable measures to meet the budget constraints of subsequent years;

Considering also

the request of the Committee of Council of 7 November 1996, the discussions at TREF on 21 November 1996 and at the Standing Concertation Committee (SCC) on 4 December 1996, document CERN/FC/3942 - CERN/2164, entitled 'Proposed Actions concerning the 1997 Personnel Budget' and the Finance Committee's recommendations of 18 December 1996;

notes the exceptional financial circumstances in which the Organization finds itself and **approves** the measures provided for in document CERN/FC/3942 - CERN/2164."

3. Two of the "measures provided for in document CERN/FC/3942 - CERN/2164" were a reduction of not more

than 2 per cent in the staff budget and, for 1997, a cut in take-home pay in consideration for leave to be taken later. The cut in pay was in two parts. One was to be compulsory, equivalent to 2.5 per cent of basic pay and applied from 1 January to 31 December 1997; the other voluntary, equivalent to a further reduction of 2.5, 5 or 7.5 per cent of basic pay and applied from 1 February 1997.

4. By a letter of 16 January 1997 the Director-General told the staff of the Council's decisions on the budget. The 2.5 per cent reduction in pay was applied to the complainants in January 1997 and notified to them in pay slips dated 24 January.

5. On 7 February 1997 Mr. Borghini filed an internal appeal against the Council's decision of 20 December 1996 to apply the levy. Mr. Aymon and Mr. Vitasse followed suit on the 10th. By letters of 22 May and 20 June 1997 the Director-General allowed the complainants to come straight to the Tribunal on the grounds that the internal appeals served no purpose. It is the decision of 22 May that they are challenging in their complaints, which they filed on 18 August 1997. They seek the quashing of the decision and any consequent redress.

6. In their submission the Director-General's decision of 22 May 1997 is unlawful: CERN gave wrong reasons for it; drew blatantly wrong conclusions from the evidence; acted in breach of the independence of international civil servants; was guilty of abuse of authority; acted in breach of contract; and impaired their acquired right to a steady level of pay.

7. In support of their plea that the impugned decision rested on wrong reasons and wrong conclusions they contend that CERN was mistaken in its explanation: there was in fact no financial crisis warranting a compulsory pay cut. Only one member State pleaded such a crisis as a pretext for reducing the staff budget. And the reason why Germany wanted a lower contribution was not financial stringency but its wish to see international civil servants fare little or no better than national ones, particularly as to pay.

8. The plea fails. The evidence, and particularly the Council's resolution of 20 December 1996, shows that CERN's member States had not been spared the economic and financial plight of Europe at the time and so were much less able to fund the Organization. That was why, only two years after approving its collider project, they had to think again about the budget for building the collider and demand a big cut. The Tribunal is satisfied on the evidence that CERN did not give wrong reasons or draw any blatantly wrong conclusions.

9. In support of their plea of abuse of authority the complainants accuse CERN of scorning not only the independence of the international civil service by giving in to a single government that was itself defying the principle, but also its own broad interests by cutting the budget in the way it did.

10. That plea too is devoid of merit. There is not a shred of evidence to suggest that CERN was yielding to German insistence or that Germany was unmindful of the principle of independence. The impugned decision was taken because of a resolution by the Council, the sovereign body that decides things scientific, technical and administrative at CERN. The report of a German government department, which the complainants cite, did not afford the basis for the impugned decision.

11. No more cogent is the plea that CERN forgot its own interests in the way it cut its budget. It is plain from the paper headed "Scope for further budget reductions at CERN?" and from other evidence that management went into every means of coping on the smaller budget and combed every item in search of savings that would neither harm the Organization's broad interests nor lay it open to the risk of losing funds from countries like Japan and the United States that were not Members.

12. Next comes the plea that management misled staff by giving out that it had made an inquiry to see how many of them might be interested in voluntary cost-cutting measures. The point is neither here nor there. What the Director-General spoke of in his letter of 16 January 1997 was, not an inquiry, but thorough research into the financial consequences of such measures.

13. The complainants plead breach of their acquired rights in that CERN infringed the terms of their contracts of service and their acquired right to a steady level of pay. Citing many precedents, they argue that those terms are inviolate, particularly the clauses on pay.

14. Judgments 391 (*in re* de Los Cobos and Wenger) and 1118 (*in re* Niesing No. 2 and others) - to cite but two - declare that exceptional circumstances may warrant amending contracts of service. The financial crisis at CERN at

the material time did amount to exceptional circumstances that warranted the slight reduction in pay that CERN applied, for only one year anyway and in consideration for extra time off.

15. The complainants contend that in any event the impugned decision was in breach of one of their basic and essential terms of employment, their right to a steady level of pay. Citing Judgments 831 (*in re* Abdilleh and Salah), 986 (*in re* Ayoub No. 2 and others), 1334 (*in re* Abraham and others) and 1514 (*in re* Aymon No. 2 and others), they maintain that, whether the Staff Regulations or Staff Rules say so or not, the pay of international civil servants must not suffer undue erosion. To their mind the Organization acted in breach of the general principle of the international civil service known as Noblemaire.

16. The Tribunal is satisfied that there was no breach here of any principle of the international civil service. As was said in 14 above, the measure the complainants are objecting to was exceptional and limited in time. As for their right to a steady level of pay, that measure neither changed the pay scales nor had any impact whatever on terms of employment in the long term. The conclusion is that there was no breach of acquired rights.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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