

**SEVENTY-SEVENTH SESSION**

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

**Judgment 1368**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Marcel Aymon and the second complaints filed by Mr. Derek Ball and Mr. Michel Borghini against the European Organization for Nuclear Research (CERN) on 24 June 1993, CERN's replies of 13 October 1993, the complainants' single rejoinder of 28 February 1994 and the Organization's surrejoinder of 29 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Rules IV 1.01, VI 1.01 and VII 1.03 and Regulations R IV 1.01 and R VII 1.02 of the CERN Staff Rules and Regulations;

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. The method used at CERN, which is in Geneva, for the periodical adjustment of staff pay is explained in Judgment 1329 (in re Ball and Borghini) under A.

On 16 December 1992 the Organization's Finance Committee received from the Management a paper headed "The cost variation index for 1993". It reflected agreement with the Staff Association and proposed an average pay increase of 3.39 per cent - matching the rise in the Geneva consumer price index - and a further 1.5 per cent increase that was the outcome of negotiation between the Director-General and the Association in the summer of 1990. The Committee failed to reach agreement on the paper and no other proposal won the required majority, but there was a simple majority in favour of a lower increase, of 2.4 per cent.

At a meeting on 17 December 1992 the Committee of the CERN Council took up the above proposals and recommended to the Council the 2.4 per cent pay increase.

On 18 December the Council endorsed the Committee's recommendation and put a total figure on the staff budget for 1993. In a statement of even date the chairman of the Staff Association, who had asked that the Association be consulted before any final decision was taken, protested against the method used and the outcome.

The Council's decision was announced to the staff in the CERN Bulletin for the week of 11 January 1993 and was reflected in their pay slips for January.

On 10 and 17 March 1993 the complainants lodged an internal appeal against the Council's general decision of 18 December 1992 and the individual decisions in their January pay slips. Two of them, Mr. Ball and Mr. Borghini, said that they were appealing both "as elected staff representative[s] and individually". They asked for leave to go straight to the Tribunal if the appeal was rejected. By letters of 26 March 1993 - the impugned decisions - the Director-General informed them of the rejection of the appeal and gave them such leave.

B. In the complainants' submission the Council's decision of 18 December 1992 shows several flaws.

First, neither the five-yearly salary review in 1990 nor the annual reviews in 1991 and 1992 that preceded the impugned decision were done properly.

The Staff Association was constantly kept out of the decision-making process, though Rule VII 1.03 and Regulation R VII 1.02 require the Director-General to consult the staff on general questions concerning them. In

June 1990 the Council did not endorse the proposals from the Tripartite Advisory Committee on Conditions of Employment but merely approved a new method of negotiating. It based its decision of 14 December 1990 not on the outcome of the negotiations in the summer of 1990 but on the motion of a single delegation. In the annual review for 1991 it disregarded the figure that the Management and the Staff Association had agreed upon. It did so again in 1992, when the Council and its subsidiary bodies declined to let the Staff Association have its say before they reached decisions. By discounting the outcome of the negotiations between the Management and Staff Association - though it had itself asked for such negotiations - the Council acted in breach of good faith and the principle of stability in law.

That is borne out by what the Organization's legal adviser said at a meeting of the Committee of the Council on 17 March 1993: he advised caution over the term "negotiation" on the grounds that it might fetter the Management's authority to take decisions.

The Council's vote on 20 December 1991 was improper. Citing letters of 27 November 1992 from two delegations, the complainants further challenge the lawfulness of the decision of 18 December 1992 on the grounds that pressure was exerted to carry it.

No reasons were stated for the general decision on staff pay or the Director-General's final decisions.

The complainants' second plea is that CERN was in breach of the rules and the substantive criteria for adjusting pay which it had itself set in 1979 and consistently applied ever since.

Although the Council may determine salary scales and review them from time to time - indeed Rule IV 1.01 says it shall - and exercises discretion in doing so, the competent authority is bound, once it has laid down the procedure and method to be followed in adjusting pay, itself to comply with them. Yet four times - in 1989, 1990, 1991 and 1992 - the Council's reckoning of staff pay has been quite arbitrary and ignored the method it approved in 1979. As a result the complainants have, they allege, lost at least 7 per cent in earnings over four years. In 1992 the procedure was even more seriously flawed than in earlier years since it discounted the first factor of reckoning, trends in the cost of living at Geneva. Taking account thereof is a "firm" and binding rule. So CERN has failed in its duty to treat staff fairly and in good faith.

The complainants ask the Tribunal to quash the Director-General's decisions of 26 March 1993 and award them costs.

C. In its replies CERN challenges the receivability of Mr. Ball's and Mr. Borghini's complaints insofar as they purport to be acting as members of the Staff Association and of all three complaints insofar as they impugn the Council's decision of 18 December 1992. According to both Rule VI 1.01\* and the case law a complaint is receivable only insofar as it challenges an individual decision applying a general one. And the indirect challenge to the individual decisions applying the Council's decisions of 1989, 1990 and 1991 is out of time. To let the complainants challenge the lawfulness of the Council's decisions would seriously impair stability in law within the Organization.

(\*Rule VI 1.01 says that:

"Every member of the personnel shall have the right to appeal against any decision of the Director-General concerning himself.")

On the merits CERN submits that none of the complainants' pleas is sound.

Rule VII 1.03 and Regulation R VII 1.02 require consultation, not between Council but only between Director-General and Staff Association. So the Council's decisions of December 1991 and December 1992 were not in breach of those provisions.

When it asked the Management on 22 June 1990 to start direct negotiation with the staff the Council was not relinquishing its sovereign decision-making authority. The legal adviser's statement of March 1993 was on a different matter and immaterial to this case.

The Council carried out the voting properly in 1991 and in 1992. The letters from the two delegations - which in any case were not addressed to the complainants and which they may not rely on - were about finances in the two

member States and are irrelevant.

The complainants acted in breach of good faith by applying for leave to go to the Tribunal if their appeal failed and then demanding a substantiated decision.

The Council has no duty to state the reasons for general decisions.

The method used since 1979 to adjust pay and the prescribed procedure were followed in 1992 and 1993. In any event the index provided for in Regulation R IV 1.01 for the periodic salary review is not binding in law.

D. In their rejoinder the complainants ask what construction is to be put on Judgment 1329. In their view the ratio decidendi is at variance with Judgment 832 (in re Ayoub and others), in which the Tribunal held that the challenged decisions might not be taken out of context. Their financial position should therefore be looked at in the light of the cumulative injury they have sustained because of "the series of small changes" made by the Council. Although the Tribunal did not uphold that argument in Judgment 1329, what the complainants call the "trigger point" that Judgment 832 postulated was passed in 1993.

Although Judgment 1329 held that the Council's only obligation was to "determine pay scales from time to time", it failed to meet that obligation in 1992 and merely established an "overall staff budget index". So either the pay slips have no basis in law or else the Director-General determined the pay scales himself, though he is not empowered to do so.

The impugned decisions compound a run of measures which - whether or not they were lawful - have made their financial plight worse and so infringed their acquired rights. The injury is the greater because, contrary to what CERN alleges, the five-yearly review in 1990 did not come to an end with the Council's decision of 14 December 1990.

Citing a paper of 1979 reviewing pay at CERN, they reaffirm that the first factor of the method is binding.

Lastly, they say that they obtained lawfully the delegations' letters of 27 November 1992 and ask CERN for an "apology" on that score.

E. In its surrejoinder CERN contends first that, whatever the Tribunal may rule, the complainants will not get the increase in pay they want. So they show no cause of action.

Secondly, it submits that their pleas are identical to those that the Tribunal reviewed and dismissed in Judgment 1329 and are therefore unfounded.

Thirdly, and turning to the pleas in the rejoinders, it maintains that though the Council did not expressly say so in determining the staff budget index it thereby set the pay scales for 1993. When the Finance Committee approved the 1993 budget it pointed out that "in December 1992 the Council decided to grant a weighted average salary adjustment of 2.46 per cent". In any case, even if the Tribunal holds on that account that the Director-General's implementing decisions of January 1993 were unlawful, it may not set pay in the Council's stead.

The requirements of the case law on acquired rights are not met here. No provision has been amended to the complainants' detriment. Besides, provisions on variables like a pay index do not create acquired rights.

What was said in Judgment 1329 applies to the first and second factors alike, and the quibbling over the delegations' letters calls for no answer.

## CONSIDERATIONS:

1. On 10 and 17 March 1993 the complainants lodged appeals with the Director-General of CERN. They were challenging the decision the Organization's Council had taken on 18 December 1992 to limit the increase in the staff budget for 1993 to 2.4 per cent and the individual decisions in their pay slips for January 1993, which show an increase of 2.46 per cent. The Director-General has given them leave to come straight to the Tribunal without prior referral of their claims to the Joint Advisory Appeals Board.

2. The three complaints are joined because they challenge the same decisions and rest on the same pleas.

## Receivability

3. The Organization contends that the complaints are irreceivable on the grounds of the complainants' lack of locus standi, the nature of the decisions they are impugning and the thrust of their pleas.

4. The answers are in Judgment 1329 (in re Ball and Borghini) of 31 January 1994, which was about CERN staff pay for 1992 and by which the Tribunal abides save as to two issues that are peculiar to this case.

5. Over and above the objections to receivability that Judgment 1329 dismissed, the Organization argues in its surrejoinder that since all that the complainants claim is the quashing of the Director-General's decisions to reject their internal appeals they show no cause of action; even if the impugned decisions were set aside the Director-General need then merely review their internal appeals and the decisions applying the new salary scales to them would still stand.

6. Such narrow interpretation of their claims is unsound. To reject their internal appeals was to uphold the decisions they were appealing against. It is those decisions that are the nub of their complaints and that beyond question afford them a cause of action.

7. Besides the pleas put forward in the complaints that Judgment 1329 ruled on, the complainants have two more, and the first question is whether they are receivable. One of them is that a run of unlawful decisions has cumulatively harmed the financial interests of CERN staff to the point of infringing their acquired rights.

8. Judgment 1329 said in 9 that the lawfulness of the individual decisions in pay slips may be determined only by reference to the Council's latest decision on pay scales and that appeal will not lie sine die against earlier decisions. Yet the plea of breach of acquired rights is receivable and in ruling on it the Tribunal may take into account any issues of fact it deems material. As it said in Judgment 986 (in re Ayoub No. 2 and others), "especially in times of change material evidence must include evidence on the general context in which the decision has been taken ... A run of small amendments may offend against the whole spirit of the rules". So an employee may properly plead a decline in his situation tantamount to impairment of the essential and fundamental terms of his employment, even if the decline has been gradual and due to an accumulation of decisions which are no longer open to challenge and none of which, taken singly, would have been declared unlawful.

9. Secondly, the complainants contend that the Council's decision of 18 December 1992 did not approve pay scales but merely set a percentage increase for expenditure on staff. CERN retorts that the complainants may not so plead because upholding their point of view would remove the basis in law for the payments of salary they have been made.

10. That is an issue that turns on the substance of their claims. Having as they do an indisputable interest in challenging the figure of pay, they may plead as they wish in challenging the decision that affords the basis for it in law.

11. The conclusion is that for the reasons given in Judgment 1329 under 6 the complainants may not directly seek the quashing of the Council's decision of 18 December 1992. They may, however, challenge the individual decisions in their pay slips for January 1993 by pleading the unlawfulness of the decision of 18 December 1992 - but not the ones on pay in earlier years - and the infringement of any acquired rights they lay claim to under rules or contract.

## The merits

12. There is no need to take up all the complainants' pleas since they succeed in their contention that the Council's decision of 18 December 1992 afforded no proper basis for pay in 1993.

13. Rule IV 1.01 says that "the remuneration scales shall be determined and periodically reviewed by the Council", and Regulation R IV 1.01 that "when reviewing remuneration, the Council shall use as a guide an index, the composition and method of calculation of which it shall determine". A working party recommended in 1979 and CERN decided that there should be general review of pay scales every five years and yearly review in between. The Director-General reports any resulting adjustments to the Finance Committee and to the Council in December and their decisions ordinarily take effect at the following 1 January. They take account of movements in an index

that reflects the cost of living in Geneva and the pay of staff of the Geneva public utilities department or the Swiss Federal Civil Service. The index serves as a "guide" in taking decisions and, as Judgment 1329 said, creates no obligation in law.

14. In this instance the cost variation index was reckoned for 1993 and a detailed report on method and results was put to the Finance Committee and the Committee of the Council. But the focus of debate by the competent bodies was not the "guide" but the financial plight of CERN and its membership. The Council voted merely for increases of 2.4 per cent in the budget for staff and of 1.6 per cent in the budget for supplies. It thereby took decisions in discharge of its responsibility for the budget, but it omitted to review the "remuneration scales", and that is what Rule IV 1.01 requires. It is plain on the evidence that it was the Director-General who, in keeping with the Council's budgetary decisions, granted an increase in pay for all staff. The increase was 2.46 per cent. That that is much the same figure as the increase approved in the budget shows CERN to be wrong in its assertion that the Council's decision on the index applicable to the staff budget also determined the index applicable to staff pay. The Finance Committee did approve the budget for 1993 in March of that year on the strength of a 2.46 per cent "weighted average salary adjustment", and similar practices had gone unchallenged in the past. But that does not alter the fact that staff pay for January 1993 rested on a budgetary decision that failed to set the new pay scales.

15. So the complainants succeed in their claim to the quashing of the Director-General's decisions of 26 March 1993 upholding the ones in their pay slips for January 1993. The individual pay slips are set aside too.

16. Lastly, the complainants are entitled to a single award of costs, and the amount is set at 15,000 French francs.

#### DECISION:

For the above reasons,

1. The individual decisions in the complainants' pay slips for January 1993 and the Director-General's decisions of 26 March 1993 to uphold them are set aside.
2. The case is sent back to the Organization for the setting of the complainants' pay for January 1993 on the strength of lawfully determined scales.
3. CERN shall pay the complainants the single sum of 15,000 French francs in costs.
4. Their other claims are dismissed.

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

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda  
P. Pescatore  
Michel Gentot  
A.B. Gardner