

SEVENTY-EIGHTH SESSION

***In re* AUDRIA**

Judgment 1412

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Markus Audria against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 15 December 1993, CERN's reply of 11 April 1994, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 24 October 1994;

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

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. On 1 August 1991 CERN brought in a new career plan known as the Merit-Oriented Advancement Scheme (MOAS). The scheme distinguishes between grading and performance and makes advancement depend mainly on merit. Staff are put on a "career path", and each path comprises grades and steps. The scheme was explained in a document issued on 21 May 1991 and headed "A merit-oriented advancement policy based on career paths" and in another of 3 October 1991 headed "Instructions for the designation of career paths to present staff members". The document of 21 May says that "the criteria used will be the staff member's present classification and level of function together with his/her potential". The Instructions stipulate that the designation "has to be fair to all staff, as objective as possible, and to normally place staff in a career path where they have reasonable prospects for future ... advancement".

There were four stages in the designation of the career paths (1) proposal of a provisional path by the Personnel Division; (2) examination of that proposal by the competent division, which may make an alternative one; (3) review of the proposal by the Personnel Division and discussions between official and supervisor; and (4) consultation between the division and Personnel to agree on a final proposal to put to the Director-General for decision.

The complainant, a Swiss citizen born in 1937, was at the material time employed by CERN as a "technical assistant" in charge of the Photographic Reproduction Laboratory at grade 8.

By a letter of 14 February 1992 the Leader of the Personnel Division informed him that the Director-General had decided to put him on career path V.

In a letter of 31 March to the Director-General he appealed and asked for path VI. On 30 April 1992 the Director-General informed him of the referral of his case to the Joint Advisory Appeals Board.

In its report of 22 December 1992 the Board referred to "Mr. Audria's ability, particularly his apparent ease in gaining a grasp of up-to-date methods", and recommended putting him on path VI as from 1 March 1992.

By a letter of 3 March 1993, the impugned decision, the Director-General rejected his appeal on the ground that his "grasp of up-to-date methods" did not suffice to warrant a higher career path.

B. The complainant submits that the internal appeals procedure was flawed inasmuch as the Administration failed to take account of all the reasons on which the Appeals Board had based its recommendation of 22 December 1992. His "grasp of up-to-date methods" was not the main reason it gave.

Citing the documents dated 21 May and 3 October 1991, the complainant submits that CERN failed to comply with "the substantive rules on the initial designation of career paths".

Although the Instructions make age a criterion only for the purpose of the provisional designation, CERN took account of age in its final decision too. The complainant's age is the less relevant because his advancement was formerly held up and he should have reached his present grade much sooner.

The Administration discounted his professional attainments and potential, and his division did not propose putting him on a higher path as it was free to do for "staff whose present functions and/or future potential are judged to be insufficiently reflected in the provisional designation".

He says that CERN leaves him no hope of advancement and that that is very discouraging.

He seeks the quashing of the Director-General's decision of 3 March 1993, assignment to career path VI as from 1 March 1992, moral damages and costs.

C. In its reply the Organization submits that the complainant's allegation of a procedural flaw in the internal appeals procedure is immaterial since the Director-General took account of "all" his duties.

CERN says that the procedure for designating his career path - the purpose of which was not advancement - was carried out according to objective criteria and in compliance with the applicable rules.

It denies that his age had anything to do with the final decision. His allegation that he should have got his present grade much earlier is "utterly gratuitous and unproven".

CERN went thoroughly into his case and took account both of his potential and of the level of his duties. It points out that "potential" does not include quality of performance or qualifications but simply affords an opportunity of taking account of "emerging" duties. In any event the Organization determines at discretion whether the criteria are relevant.

Prospects of further advancement are a general objective, not a criterion of any relevance to the advancement scheme. In making the plea he has failed to show what rule CERN may have infringed. Far from dashing hopes, the new scheme enhances prospects of advancement. So there is nothing "discouraging" about it.

Lastly, CERN argues that his claim to moral damages is irreceivable because he puts no figure on it and is, besides, devoid of merit.

D. In his rejoinder the complainant enlarges on his pleas. He maintains that the scheme should not "depreciate" the attainments of staff. He says that the criteria CERN chose were not objective and that it was bound to abide by the general principles underlying the scheme. The definitions used to determine his potential and the level of his duties overlooked his qualifications and experience and were therefore wrong. He presses his objections to the procedure which CERN followed, and which he says was further flawed by the Director-General's being also the leader of his division at the material time.

E. In its surrejoinder CERN demurs at the complainant's attempt to replace the criteria in the Instructions with others more to his liking. It observes once again that his reference to general principles on the designation of career paths is irrelevant: the only issue is whether the Administration followed the proper procedure. It denies overlooking essential facts and submits that the conditions for an award of moral damages are not met.

CONSIDERATIONS:

1. On 1 August 1991 CERN brought in a new scheme for career advancement and organisation to reward personal performance and link advancement to personal merit. It is called the Merit-Oriented Advancement Scheme (MOAS). Established officials are put on a "career path" that corresponds to their main duties. Each path comprises several grades. Advancement depends on yearly appraisal of performance. CERN accordingly decided to put each staff member on a path with due regard to level of pay and in accordance with a procedure carried out in stages. The first stage was for the Personnel Division to allot a provisional career path according to criteria that depended mainly on grading at the date of the original determination and any later career changes. At the second stage the division was to see whether the staff member's current duties and potential corresponded to the provisional path and to make sure there was no breach of equal treatment. The staff member then saw his supervisor, there was discussion between his division and the Personnel Division, and there might be referral to a "Career-Path Advisory Commission". The Personnel Division put the final proposal to the Director-General for decision.

2. The complainant, a "technical assistant" in the Photographic Reproduction Laboratory, was formerly at grade 8, step 11. He was provisionally allotted path V. By a decision dated 14 February 1992 the Leader of the Personnel Division confirmed his assignment to that path, and he lodged an appeal with the Joint Advisory Appeals Board against the decision. The Board recommended putting him on path VI, but the Director- General, after comparing the full range of his duties with his colleagues', decided on 3 March 1993 to confirm his assignment to path V.

3. The complainant seeks the quashing of that decision and an award of damages for moral injury. He pleads procedural flaws and breach of CERN's substantive rules on the initial allotment of the career path.

4. His procedural plea may be summed up as follows. The reason why the Director-General declined to endorse the Advisory Board's recommendation was that its main argument in favour of changing his path - his grasp of modern techniques - was too flimsy. He points out that the Board gave several other reasons, the Director-General ignored them, and so the decision was unlawful. He further observes in his rejoinder that the Director-General, who signed the impugned decision, was also the leader of the division which had already recommended path V. In his view that too is a fatal procedural flaw.

5. On the latter issue it may be a pity that at two decisive stages in the procedure one and the same person was called upon to choose the complainant's career path; but the coincidence was due to a duplication of function which in itself was not wrong. Only if the Director-General's decision proved not to be impartial and objective would it be set aside. But the condition is not met: it is plain on the evidence that the preparatory work on the Director-General's decision was done by subordinates who had played no part at all in the prior stages of the procedure.

6. His main plea about a procedural flaw also fails. The Joint Advisory Appeals Board went thoroughly into his qualifications and experience and his apparent ease in gaining a "grasp of up-to-date methods" was indeed only one of the reasons for its recommendation. Although the Director-General took it to be the main reason for the recommendation and felt that it warranted no change in path, he did make it plain to the complainant that it was "after comparing the full range of your duties with your colleagues'" that he was confirming the choice of path V. Such reasoning shows a desire to ensure rigorous equality of treatment for the staff and is of a kind that affords a proper justification for the impugned decision. So the explanation of the decision was neither inadequate nor mistaken.

7. As to the alleged breach of substantive rules, the complainant contends that the impugned decision disregards the criteria laid down for the initial allotment of career path. In his submission CERN took account of his age on reaching his grade in determining his provisional career path; refused to change it even though it was obviously at odds with his duties and potential; put him on a path that offered him no reasonable prospects of advancement; and paid no real heed to safeguarding his interests and encouraging him.

8. Before taking up those pleas the Tribunal refers to the principles it set out in Judgment 1354 (in re Guyen). That case too was about the allotment of a career path to a CERN employee and the judgment said: "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". Of course if CERN failed to observe criteria it had itself laid down there would be a mistake of law; but for the reasons stated below it did not so fail in the present case.

9. For one thing, it is not proven that the complainant's age when he reached grade 8 was a determinant of the confirmation of path V. That he was 47 when he reached grade 8 may explain why he got provisional assignment to path V, but that was in keeping with the rules applicable to all staff in category 3: path V - said those rules - was for anyone "in job grade 8 where that grade was attained after age 38". The Tribunal is satisfied that in reaching the final decision the Director-General sought in the complainant's case, as indeed in others, to ensure that the provisional career path properly fitted his current duties and potential and was fair in comparison with the path that other staff were put on. There is no evidence to suggest that age was decisive at that stage.

10. The second point is this. The complainant was in charge of the Photographic Reproduction Laboratory and, as the Appeals Board's report shows, his duties were by no means lowly. Yet the choice of path V was not obviously wrong. The tables which the Council of CERN approved in June 1991 show that path V corresponds to "higher" technical or administrative work, the main duties being described as "Technical or administrative work involving the study of complex and highly specialised problems" and "responsibility for an organic work unit". The nature of

the complainant's duties shows that path V was not plainly mistaken.

11. Nor has he any grounds for supposing that the Director-General underestimated his potential and shattered his career prospects. The new career scheme does not have the effect of impairing the staff's prospects, and CERN has by no means ruled out - far from it - the opening up of prospects of further advancement for the complainant.

12. Lastly, he may not, in the context of a challenge to the choice of career path, object to earlier delays which he believes held up his advancement. Nor has he any grounds for saying that putting him on path V may "discourage" him: CERN's evident purpose in making such ambitious reforms is to act in the general interest and try to ensure equal treatment for all its staff.

13. The conclusion from the foregoing is that the complainant's claim to the quashing of the impugned decision must fail, and so too does his claim to damages, there being no need to determine whether the latter claim is receivable.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner