

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M.
v.
CERN

130th Session

Judgment No. 4276

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. M. against the European Organization for Nuclear Research (CERN) on 24 August 2018 and corrected on 9 November 2018, CERN's reply of 13 March 2019, the complainant's rejoinder of 17 June, corrected on 2 July, CERN's surrejoinder of 14 October, the complainant's further submissions of 18 December 2019 and CERN's final comments of 5 February 2020;

Considering the applications to intervene filed by Mr F. C. and Mr J.-B. Z. on 7 February 2020, Mr A. P. on 19 February, and Mr S. B., Mr J. D. D., Mr M. J. and Ms C. L. on 25 February, and CERN's comments thereon dated 18 March 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges his performance appraisal under the new merit recognition system established following the 2015 five-yearly review.

Under the relevant provisions of the Staff Rules, the financial and social conditions of members of the personnel are subject to a five-yearly review to ensure that those conditions allow CERN to recruit and retain the staff members required for the execution of its mission from all its Member States. On 19 June 2014, the Council of CERN decided, on a proposal from Management, that the 2015 five-yearly review

would focus on basic salaries for staff members and the career structure within the Organization. Following that review, the Director-General proposed to the Council that basic salaries be maintained at their current level, the career structure streamlined, and staff members better compensated for their performance by abolishing career paths and salary bands and replacing them with a new system comprising 10 grades, defined by a midpoint, minimum and maximum salary, within which a staff member could advance each year and by replacing the system of in-grade advancement in steps with a new system of merit recognition. On 17 December 2015, the Council approved those proposals, which were scheduled to enter into force on 1 January 2016 in respect of the non-adjustment of basic salaries and on 1 September 2016 in respect of the measures relating to the career structure. In implementation of the latter measures, staff members were assigned to “benchmark jobs”, that is to say categories of jobs which covered a set of individual employment situations involving similar main activities and a common purpose. Those benchmark jobs were initially assigned on a provisional basis so that they could be checked later if need be. Thus, if staff members considered that they had been assigned to a benchmark job that did not match their functions, they could discuss the matter with their supervisors and the Administration. Benchmark jobs were to be definitively assigned to staff members by 1 May 2017, later postponed to 1 July 2017. As for the new merit recognition system, Administrative Circular No. 26 (Rev. 11) of November 2016 cancelled and replaced the previous circular of January 2014, and new guidelines were put in place.

By a letter dated 18 August 2016, the complainant was advised of the benchmark job to which he was provisionally assigned and of the grade awarded to him as from 1 September, namely that of “principal applied physicist” at grade 9. His basic salary remained unchanged. His benchmark job was confirmed on 30 June 2017.

The complainant’s performance for 2016 was assessed in the first quarter of 2017 in accordance with the provisions of Administrative Circular No. 26 (Rev. 11). He was interviewed by his supervisor in March and his appraisal report was approved in April. His Group Leader proposed that his performance be qualified as “strong”, but the Head of Department gave him the qualification of “fair”. On 16 June 2017 the complainant was notified of the outcome of the process and, on 20 June 2017, when he had left the Organization following his decision to resign with a view to taking early retirement, he expressed

his dissatisfaction with that qualification. As his view did not prevail, he filed a request for review, which he subsequently withdrew owing to a procedural flaw. Then, on 21 July 2017, he brought an internal appeal against the Council's decision of 17 December 2015 to "alter the merit recognition system and hence the advancement system" – of which he states he was notified in his pay slip dated 24 May 2017 – and against the outcome of his performance appraisal for 2016. In his internal appeal, he sought the setting aside of the general decision of 17 December 2015 and a fresh performance appraisal based on the former appraisal criteria.

Several other staff members filed an appeal with the Joint Advisory Appeals Board against the same general decision. In view of the similarities between some of those appeals, the Board decided to deal with the issues of the alteration to the career structure and the associated new merit recognition system jointly, and then consider the complainant's personal situation separately. In its opinion of 27 April 2018, delivered after having heard the complainant, the Board found that the 2015 five-yearly review was not procedurally flawed and that the Organization had acted transparently. With regard to the new career structure, the Board recommended that more detailed information be provided to supervisors on the opportunities afforded by the new system in terms of promotion and merit recognition. It did not identify any obvious procedural defects in the complainant's performance appraisal and recommended that the appeal be dismissed.

By a letter dated 25 May 2018, the complainant was informed of the Director-General's decision to dismiss his appeal. That is the impugned decision.

On 24 August 2018 the complainant filed his complaint with the Tribunal, requesting it to set aside the impugned decision and the decision of 17 December 2015, to cancel his performance appraisal for 2016 and to award him 20,000 euros in costs. In his rejoinder, he further requests moral damages in the amount of 3,000 euros for the injury that he considers he suffered as a result of alleged delay in the internal appeal procedure, and the cancellation of the new merit recognition system.

CERN asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant seeks the setting aside of:

- the general decision of the Council of CERN of 17 December 2015 adopting Management’s proposals following the five-yearly review which “alter[ed] the merit recognition system and hence the advancement system”;
- the individual decision of 16 June 2017 rating his performance for 2016; and
- the Director-General’s decision of 25 May 2018 dismissing his internal appeal against the aforementioned decisions.

2. The complainant requests oral proceedings, but the Tribunal considers it is sufficiently informed of the case by the content of the written submissions and does not regard oral proceedings as necessary.

3. The five-yearly review, approved by the Council of CERN on 17 December 2015, comprised several different parts. One of those parts focused on the new career structure, which had two main features: first, the existing structure (which included eight career paths, 21 salary bands and some 500 step positions) was replaced by a new structure that the Organization considered more consistent, composed of ten grades, and, second, the system of in-grade advancement in steps was replaced with a new merit recognition system combining recurrent elements (salary increases) and non-recurrent elements (performance payments) calculated as a percentage of the midpoint salary for the staff member’s grade.

4. Under Administrative Circular No. 26 (Rev. 11), the annual exercise for appraising a staff member’s performance commences with an interview, followed by an appraisal report, a performance qualification and, where applicable, the granting of performance reward(s) (paragraph 17). At the beginning of each annual exercise, an interview is organised between the staff member and her or his supervisor (paragraph 18) during which the supervisor assesses the staff member’s global performance for the reference year, that is to say the calendar year preceding the decision in the framework of the merit recognition process (paragraphs 14 and 24). The supervisor carries out this assessment following discussion with his hierarchy (paragraph 26). The result of the appraisal is recorded in a written report (paragraph 28), which is forwarded successively to the Section Leader and the Group Leader, who give their endorsement, and, lastly, to the staff member

(paragraph 29). On the basis of the appraisal report, the Head of Department qualifies the staff member's performance as "insufficient", "fair", "strong", or "outstanding", and includes this qualification in the report (paragraph 30). In rating the staff member's performance, the Head of Department takes account of the performances of all staff members within the Department and, for staff in grades 8 to 10, consults certain senior staff members of the Department, whom the Head of Department appoints at the beginning of the annual exercise, as well as the representative of the Human Resources Department (paragraph 31). A performance reward in the framework of the annual exercise is based on the performance qualification (paragraph 32).

5. The annual interview with the complainant's supervisor took place on 2 March 2017. On 11 April 2017 the supervisor (who was also the complainant's Section Leader) and his Group Leader approved the appraisal report. The Group Leader proposed that the complainant's performance be qualified as "strong", but the Head of Department subsequently qualified it as "fair". The complainant was notified on 16 June 2017 of the outcome of the process and of his salary increase from 1 May 2017. The complainant sent an e-mail on 20 June 2017 expressing his dissatisfaction and then filed a request for review of the decision, which he later withdrew due to a procedural flaw.

The complainant lodged an internal appeal on 21 July 2017. That appeal was directed, on the one hand, against "the new career development and performance-based promotion system", which was introduced at CERN on 17 December 2015, and, on the other hand, against the "appraisal report completed on 16 June 2017 qualifying [his] performance as merely 'fair'".

In its opinion of 27 April 2018, the Joint Advisory Appeals Board found that the internal appeal should be dismissed.

By decision of 25 May 2018, the Director-General followed the recommendation of the Joint Advisory Appeals Board. She hence dismissed the internal appeal and upheld the decision of 16 June 2017 rating the complainant's performance for 2016.

6. The complainant seeks the setting aside of the general decision of the Council of CERN of 17 December 2015, the individual decision of 16 June 2017 qualifying his performance and the Director-

General's decision of 25 May 2018 dismissing his internal appeal against the aforementioned decisions.

The Tribunal's case law has it that a general decision which requires individual implementation cannot be challenged directly; it is only the individual implementing decisions which may be challenged (see Judgments 3628, under 4, 3736, under 3, 4008, under 3, and 4119, under 4, and the case law cited therein). The lawfulness of the general decision may only be challenged as part of the challenge to the individual decision.

The complaint must therefore be construed as being directed against the individual decision of 16 June 2017, upheld by the decision of 25 May 2018, it being understood that, in support of his claims against those decisions, the complainant challenges the lawfulness of the part of the five-yearly review relating to the new career structure and, in particular, the associated new merit recognition system on which those decisions are founded.

7. The Tribunal has consistently held that international organisations have wide discretion in taking decisions concerning staff performance appraisal. Such decisions are therefore subject to only limited review by the Tribunal, which will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1583, under 2, 3039, under 7, 4010, under 5, 4062, under 6, and 4170, under 9).

Several pleas raised by the complainant fall within the scope of the limited review thus defined.

8. In particular, the complainant submits that the decision of 16 June 2017 qualifying his performance is tainted with an error of fact, evidenced by the discrepancy between the appraisal conducted by his Group Leader and his performance qualification by the Head of Department, and by an error of law, since the impugned decision was based on an unlawful criterion, namely the need to comply with the Administration's recommendation as to the proportion of "fair" qualifications to be awarded (between 6 and 12 per cent). He also alleges a breach of paragraph 30 of Administrative Circular No. 26

(Rev. 11) according to which the Head of Department is to qualify the staff member's performance on the basis of the appraisal report. Finally, he contends that there has been a failure to provide sufficient reasons, since the only explanation provided to him was that "the decision arises from a comparison with other principal staff members".

9. During his hearing by the Joint Advisory Appeals Board, the Head of Department said that the qualification of "fair", which the complainant had been awarded even though the Group Leader proposed that his performance be rated as "strong", was explained by "[the] comparison with other principal staff members" and by "the need to keep to the recommended proportion (between 6 and 12 [per cent] of qualifications were to be 'fair')".

In its submissions, CERN acknowledges that the recommendations for the overall distribution of performance qualifications cannot be regarded as mandatory allocations or quotas since in all cases, the staff member's performance is the main criterion used in her or his appraisal. Since the Head of Department took into account the need to comply with quotas for the award of a given qualification, which is irrelevant to the appraisal of staff members' merits, his decision was unlawful.

Furthermore, paragraph 30 of Administrative Circular No. 26 (Rev. 11) expressly provides that the Head of Department is to qualify the staff member's performance on the basis of the appraisal report, notwithstanding that paragraph 31 requires her or him to take account of the performance of all other staff members of the Department and, for some staff members, to consult certain senior staff members of the Department and the representative of the Human Resources Department. However, at his hearing before the Joint Advisory Appeals Board, the Head of Department stated that, in rating the complainant's performance, he had not taken account of the appraisal report but of "the reality, the outside". It follows that the decision of the Head of Department, who completely ignored the appraisal report, was taken in breach of aforementioned paragraph 30.

In addition, the Organization merely repeats that the Head of Department's decision not to endorse the Group Leader's proposal that the complainant's performance be qualified as "strong" resulted from a comparison with other principal staff members. However, the Organization's submissions do not contain any information that would allow the Tribunal to understand what factors were taken into consideration in that comparison and how it was performed in this particular case. In the absence of such information, the Tribunal finds that insufficient reasons were given for the decision.

In light of the foregoing, the complainant's grievances are well founded.

10. It follows that the decision of 16 June 2017 and, accordingly, the decision of 25 May 2018 must be set aside. There is therefore no need to consider the many other pleas set out in the complaint, whether they directly concern the aforementioned individual decisions or whether they allege that the general decision on which those decisions are based – namely the decision of the Council of CERN of 17 December 2015 – is unlawful.

11. The complainant seeks an order that a fresh performance appraisal be carried out. Since the decisions relating to his appraisal have been set aside, it is for the Organization to take a new decision on this matter, even though the impact of that decision will be very limited, assuming that the Organization changes its qualification. Indeed, the complainant left CERN on 31 May 2017 and, under paragraph 64 of Administrative Circular No. 26 (Rev. 11), the performance qualification for the preceding year is not reflected in the basic salary until 1 May of the current year, which is to say, in this case, 1 May 2017.

12. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 5,000 euros.

13. All other claims must be dismissed.

14. The interveners submit that the general decision of the Council of CERN was unlawful and that they, as individuals, are in a legal and factual situation similar to that of the complainant since their performance was rated as "fair" or "insufficient". However, it must be

observed that, in this judgment, the Tribunal has not ruled on whether the general decision of the Council of CERN was lawful, and that the complainant's performance qualification was cancelled on the basis of the specific grievances that he put forward regarding the individual decision in that respect. The interveners – who moreover failed to file internal appeals – have not proved that they are in a similar legal and factual situation to the complainant and that they could invoke the same grievances with regard to their own performance qualifications.

Accordingly, the applications to intervene must be dismissed.

DECISION

For the above reasons,

1. The decisions of 16 June 2017 and 25 May 2018 are set aside.
2. The case is remitted to CERN for a new decision as specified in consideration 11 above.
3. The Organization shall pay the complainant costs in the amount of 5,000 euros.
4. All other claims are dismissed.
5. The applications to intervene are dismissed.

In witness of this judgment, adopted on 23 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakit , Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dra en Petrovi , Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKIT 

YVES KREINS

DRA EN PETROVI 