

EIGHTY-FIRST SESSION

***In re* ANTOINET (No. 2) and CUENCA-PEREZ**

Judgment 1510

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gérard Antoinet and the complaint filed by Mr. Antonio Cuenca-Pérez against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 31 March 1995, CERN's replies of 19 July, the complainants' rejoinders of 8 December 1995 and the Organization's surrejoinder of 20 March 1996;

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. On 1 August 1991 CERN brought in a new career plan. It is known as the Merit-Oriented Advancement Scheme (MOAS) and is described in Judgment 1412 (*in re* Audria) under A.

The complainants are both firemen and belong to CERN's Fire and Rescue Service. The Service also employs senior firemen and team leaders.

Members of the Service expressed discontent with the grading they were to have under the Scheme and on 13 November 1991 the Leader of the Personnel Division referred their objections to a body known as the Career Paths Advisory Commission. In its report of 21 January 1992 the Commission said that putting the firemen on career path II and the senior firemen on path III was a fair transfer from the old to the new system.

By standard letters of 14 February the Leader of the Personnel Division told the firemen that they would be on path II as from 1 March 1992. On 30 March they submitted a collective appeal to the Director-General asking that they be put on path III. By a letter of 30 April the Director-General told them he would refer their case to the Joint Advisory Appeals Board.

The Board reported to the Director-General on 22 December 1992: "considering the pressure of time", it saw nothing wrong with the career paths the firemen had been put on at 1 March 1992; but it felt that taking each case separately would have been better and so it suggested setting up a working group to look at the grading of the staff of the Fire and Rescue Service.

By standard letters of 3 March 1993, which they impugn, the Director-General told the complainants and the other firemen that he endorsed the Board's recommendations.

In a preliminary report dated 30 August 1993 the working group suggested several criteria for determining the career paths of members of the Service, and they included vocational skills and training.

The Technical Inspection and Safety Commission submitted a report on 24 January 1994 on how to apply the criteria. In its view the working group's proposals could not be made to work fairly and in any event they offended against Article R II 2.07 of the Staff Regulations, which says that "A change of career path shall occur when a member of the personnel permanently assumes duties which correspond to those defined for another career path".

Further standard letters went on 14 November 1994 from the Director-General to the complainants and other firemen: he had, he said, dissolved the working group and rejected its suggestions, and he confirmed that their

career paths would be those notified in the letters of 14 February 1992.

By a letter of 29 March 1995 to the complainants' counsel CERN agreed to apply the ratio of the Tribunal's judgment to anyone else on its staff who had the same duties as the complainants.

B. The complainants contend that in putting them on path II the Director-General clearly misread the evidence because he disregarded their training and duties and their grade at recruitment. Under Annex R C 1 of the Staff Regulations path II ordinarily corresponds to "specialised manual, office or support service work": path III to "fully qualified craft or office work involving a variety of problems of execution; or responsibility for specialised work units". Like all firemen at CERN the complainants were given induction training in firefighting and first aid; and they all have three years' practical experience including at least two at CERN, and a licence to drive a heavy vehicle. So path III is the right one. Besides, CERN's consistent practice has been to recruit firemen at grade 4, and for that reason and because of the kind of work they do it cannot take them on at a lower grade.

The complainants plead breach of equal treatment. Although their duties are on a par with those of electricians and mechanics on path III, putting them on path II ranks them along with builders and unskilled workmen. Having been recruited at grade 4 on path II, they have their career prospects limited to two normal grades and one for merit whereas careers at CERN usually span three normal ones and a further merit grade.

They want the Tribunal to set aside the challenged decisions and award them moral damages and costs.

C. In its reply CERN denies misappraisal of the facts. The Director-General took account of the three criteria laid down in document CC/1858 - "present grade", "level of duties" and "potential" - before setting the complainants on path II. The classification of duties is at the Director-General's discretion and subject to only limited review by the Tribunal. So it would be an interference in CERN's autonomy to allow the plea of misappraisal. Under Staff Regulation R II 2.07 it is not the qualifications but the level of duties that is the main criterion of the career path. Inasmuch as firemen are answerable to a senior fireman or team leader and seldom undergo more than a year's training their duties come under specialised "support service work" and so merit path II. Since CERN requires that a fireman have three years' experience at recruitment the proper starting grade in path II is 4, not 3. But the Organization is also free to put an inexperienced fireman at grade 3 on path II on recruitment.

There was no breach of equal treatment. Differences in duties and training warrant keeping mechanics and electricians in one group and firemen along with builders and other sorts of workmen in another. It is mistaken to see it as discriminatory to have put the complainants at grade 4 on path II at recruitment, since they already had experience and so were not on a par with others in grade 3 on that path.

Lastly, their claims to moral damages are irreceivable because they offer no figures.

D. In their rejoinder the complainants restate their pleas. In their submission the Tribunal does have power to review the appraisal of their duties and may interfere if it is wrong. The training required of firemen shows the level of their duties even if it is not the prime determinant of the career path. On the strength of precedent the Tribunal awards moral damages if the impugned decision is unlawful and, as here, has obviously caused serious injury.

E. CERN presses its case in its surrejoinder. Its appraisal of the complainants' duties complied with the material rules and followed due consultation. It never intended that the introduction of MOAS should in itself prompt advancement or promotion. Had the Director-General put firemen on path III they would have gone straight to grade 6. So path II was plainly the right one. What they are really challenging is not the lawfulness of the individual decisions but the whole system of classifying jobs in the Fire and Rescue Service. So their case is an abuse of process.

CONSIDERATIONS:

1. The complainants are firemen in CERN's Fire and Rescue Service. Its Council brought in as from 1 August 1991 a "Merit-Oriented Advancement Scheme" which is described in, for example, Judgments 1354 (in re Guyen) and 1412 (in re Audria). CERN accordingly put them on one of the career paths the Scheme provides for, and they are objecting to the one it chose.

2. The case affects not just the complainants but all the firemen whom the Organization employs. By a decision of

14 February 1992 it put them all on path II as from 1 March. They lodged a "collective" appeal which went to the Joint Advisory Appeals Board. The Board's report was not categorical: it held that "considering the pressure of time" there was nothing wrong with the path chosen, but that the diversity of the firemen's technical qualifications precluded taking them all together; better to assess them singly. It recommended that a working group look into the grading of the staff of the Fire and Rescue Service. The Director-General agreed: by a decision of 3 March 1993 he rejected the firemen's appeal, confirmed their assignment to path II and set up an internal working group to look into the qualifications and records of each member of the Service. In its report to the Director-General the working group proposed new criteria for grading the firemen which would allow those with the right qualifications to go on path III. The officers in charge of Technical Inspection and Safety felt, however, that the criteria might prove unfair, or at least strike the firemen as such, and make for ill feeling between them. The upshot was that the Director-General rejected the criteria, disbanded the working group and told the firemen by letter of 14 November 1994 that their path would still be II, though it might change at the scheduled yearly reviews.

3. Both complainants are impugning the Director-General's decision of 3 March 1993 rejecting their and the other firemen's appeal against assignment to path II. The Director of Administration told their counsel by a letter of 29 March 1995 that CERN would not mind if only two of them went to the Tribunal provided those two "argued the common case"; it would apply to anyone else with the same duties the ratio of the Tribunal's ruling on choice of career path. Notwithstanding such "agreement" - which does not bind the Tribunal anyway - CERN protests in its surrejoinder at the complainants' challenging, not the lawfulness of individual decisions, but the whole system of grading employees of the Fire and Rescue Service. CERN sees that as an abuse of process.

4. It is wrong. An international civil servant may not ordinarily impugn a general rule that does not affect himself. Yet he may challenge any individual decision that does him injury; in so doing he may support his claims with any plea he likes; and he may thus plead breach of some general principle or of a written rule or clause of his contract that constitutes a term of appointment. The complainants' intent is plain: they are challenging the decisions to put them on path II. And, however their case may, in CERN's view, affect the other firemen, they are just as free to plead flaws in the material rules as any mistakes of law or fact in assessing the peculiarities of their own position.

5. They have two pleas. One is that the Director-

General plainly misread the evidence by overlooking the firemen's training, duties and grade in putting them on path II. Their other plea is the breach of equal treatment in likening their duties to "specialised manual, office or support service work".

6. Relevant to their first plea is the following excerpt from Judgment 1354 under 5:

"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".

Did the Director-General observe the criteria he himself had set or make an obviously wrong assessment of the complainants' qualifications and abilities?

7. They submit that their training and duties and the usual starting grade of firemen - grade 4 - entitle them to path III - "fully qualified craft or office work involving a variety of problems of execution" - not II, which corresponds to "specialised manual, office or support service work".

8. Two preliminary points are worth making. One is that the definitions of career paths in Annex R C 1 to Staff Regulation R II 2.01 are quite unsuited for particular duties such as a fireman's: since the categories are drawn too broadly approximation is needed to fit some employees in. The other point is that the whole system presumably called for review of each employee's position. According to its own new rules CERN had to take account of "present grade, level of duties and potential", and on the last of these opinion was bound to vary, at least in some instances. In the present cases there seems to have been no such individual review, though the outcome might have been to put some on path II and some on path III. CERN was understandably anxious that the initial determination of career paths should make as far as possible for equal treatment of everyone in the same grade. It was wary of suddenly upsetting the balanced ranking it had achieved in units like the complainants'. But the Tribunal is still free to review the individual decisions impugned and see whether in each particular case CERN abided by its own rules.

9. The complainants used to be in grade 5. After CERN had put them on path II they were still in the same grade.

According to the rules someone in grade 5 is entitled either to path II or conditionally to path III. CERN put them on II because their duties were more closely akin to specialised "support service work" than to "fully qualified ... work involving a variety of problems of execution". There is no denying that firemen may sometimes run into difficulty in performing some of their duties. Yet there is no obvious misappraisal of the evidence in the choice of their career path. On the contrary it is warranted because the firemen are subject to a strict chain of command and subordinate to senior firemen, who in turn take orders from team leaders. Firemen do have to have solid training, though the period is not always the same; and the grade they are recruited at is not 3 - the starting grade for path II - but 4. But neither of those facts bears out the complainants' charge of clearly mistaken determination of their career path. And since they are not saying that that determination overlooked their potential their plea cannot be sustained.

10. Nor is there any evidence of breach of equal treatment. The complainants plead: first, that firemen have been put on the same path as employees such as builders and unskilled workmen who have less varied and demanding duties than they; secondly, that they do work that is no less demanding than that of mechanics and electricians, who are on path III; and thirdly, that a fireman's career is confined to two ordinary grades and a third for merit, whereas other employees on paths II to V get access to three ordinary grades and a fourth for merit.

11. The last point can be disposed of first. As CERN observes, its practice of giving firemen grade 4 on recruitment on the grounds of prior experience does not amount to any discriminatory narrowing of career prospects. Since there is nothing to prevent CERN's recruiting them at grade 3, the starting grade of path II, they fare better by present practice.

12. The comparisons they draw with mechanics and electricians on path III and builders and unskilled workmen on path II show just how hard it is to fit employees into broad categories that perforce comprise disparate duties. An electrician or mechanic at CERN is bound to be in charge of the installation and maintenance of complex equipment and needs a higher level of technical qualifications and skills than does a fireman.

13. Conversely, though builders and unskilled workmen probably need less training and have less responsibility than firemen, putting employees on the same path does not mean that their duties are similar. In any event, whether it is right to have builders and workmen on path II is not a material issue, and putting the complainants on the same path cannot be deemed discriminatory.

14. For want of evidence of failure to treat alike people who are in like case, the complainants' claims to the quashing of the impugned decisions fail, and so therefore do their claims to moral damages and costs.

DECISION:

For the above reasons,

The complaints are 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