

**NINETY-EIGHTH SESSION**

**Judgment No. 2410**

The Administrative Tribunal,

Considering the complaint filed by Mr P.J. B. against the European Organization for Nuclear Research (CERN) on 2 September 2003, the Organization's reply of 3 December 2003, the complainant's rejoinder of 5 March 2004 and CERN's surrejoinder of 10 May 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1935, joined CERN in 1962. He retired on 1 September 2000, whereupon he became a beneficiary of the Organization's Pension Fund.

In a letter of 6 March 2001 to the Chairman of the Governing Board of the Pension Fund, the President of the CERN Pensioners' Association (hereinafter referred to as the "GAC"), which operates within the framework of the Staff Association, recalled that in 1995 the Board adopted the principle whereby "pension adjustments are designed to maintain the purchasing power of the pensioners, while ensuring equal treatment for pensioners and active members of the Fund with regard to inflation". After pointing out that, following a five-yearly review for the period 1 January 1996 to 31 December 2000, the salaries of serving officials had been adjusted to compensate fully for the loss of purchasing power accrued during that period, he requested that the Board recommend an "extraordinary pension adjustment" of 1.5 per cent in order to compensate for the loss of purchasing power due to inflation since 1996. The Governing Board considered the GAC's request at its meetings of 4 September 2001 and 5 November 2002. In a letter of 22 November 2002 the Administrator of the Pension Fund informed the GAC, of which the complainant had meanwhile become President, that the Board had "concluded that it could not support the requested extraordinary adjustment", as it had "found, on the one hand, that pensions had been adjusted annually in accordance with the relevant procedures and, on the other hand, that the financial impact on the Fund of an extraordinary adjustment would be by no means negligible, at a time when the Fund [was] feeling the full effects of depressed financial markets". The complainant asserts that it was only when he received his bank statement on 6 December 2002 that he found out that his pension had not been adjusted. The Organization, however, points out that the Administrator of the Pension Fund informs beneficiaries, immediately following the annual session of the CERN Council in December, of the decision taken by the latter with regard to pension adjustments and notifies them of how the decision is to be applied to them individually. It produces a copy of the letter sent by the Administrator to all beneficiaries. This letter is dated 22 December 2000.

By a letter of 31 January 2003 to the Director-General, the complainant filed an "appeal against the failure to adjust [his] pension". He asked the Director-General to allow him to appeal directly to the Administrative Tribunal or, failing that, to refer the matter to the Chairman of the Governing Board of the Fund. On 26 March the Director of Administration replied, on behalf of the Director-General, that the latter did not have the authority to grant his request and that he should lodge an appeal with the Chairman of the Governing Board of the Fund in accordance with the correct procedure. On 17 April the complainant therefore asked the Chairman of the Fund's Governing Board to allow him to appeal directly to the Tribunal. The Chairman agreed in a letter of 4 June, but informed the complainant that he considered his "appeal" to be irreceivable.

B. The complainant contends that the "decision" of the Governing Board of the Pension Fund to reject the request for adjustment is based on erroneous grounds since, firstly, the request was not based on a procedural flaw and, secondly, the financial situation of the Fund at the time of the request was excellent. This situation should be assessed at the time of the request and it is not reasonable to wait for the Fund to find itself in less favourable

circumstances in order to justify a refusal to adjust. He accuses CERN of having ignored three general principles of law: equality of treatment, insofar as active staff and pensioners have been treated differently with respect to inflation; the principle of *patere legem quam ipse fecisti*, insofar as the Organization was unwilling to abide strictly by the principle it had “set out” in 1995; and the principle of good faith, insofar as it created a legitimate expectation among pensioners (namely, that active staff and pensioners would be treated equally) and then thwarted that expectation.

The complainant asks the Tribunal to set aside the impugned decision, to order that his pension be adjusted by 1.46 per cent as from 1 January 2001, and to award him interest on the sums due from that date until the date of the judgment, and costs.

C. In its reply the Organization pleads that the complaint is irreceivable on the grounds that the impugned decision cannot be identified with certainty, since according to the statements given in the complaint form and in the brief, it could be either the pension payment for December 2002, as shown in the bank statement of 6 December, or the reply of the Governing Board of 22 November 2002, or else the decision on pension adjustment taken by CERN’s Council in December 2000. Furthermore, regardless of which of these is correct, the complaint is irreceivable. This is because the pension payment evidenced by the bank statement does not constitute an administrative decision which can be appealed before the Tribunal. The same applies to the letter of 22 November 2002 from the Administrator of the Pension Fund, since this merely expresses an opinion, CERN’s Council having sole responsibility for all decisions concerning pension adjustments. Lastly, as far as the decision on pension adjustments of December 2000 is concerned, the time limit for challenging it has expired.

CERN replies only subsidiarily on the merits. It contends that the complainant’s arguments are “irrelevant” since they do not concern a decision which is liable to cause him injury. In its view, the complainant is trying to challenge the decision on pension adjustments taken by CERN’s Council in December 2000. Even though, according to the Rules of the Pension Fund, the CERN Council “shall take particular account of the criteria adopted for the adjustment of salaries”, it is not legally bound to apply them automatically and in full to pensions or to guarantee full compensation for any loss of purchasing power. As for the five-yearly salary review, this has no effect on the annual adjustment of pensions. Indeed, any direct link between them would not make sense, since the purpose of the review is to ensure that conditions of employment at CERN remain competitive. The accusation of unequal treatment is therefore unfounded. Lastly, even though the Fund’s Governing Board in December 1995 recommended adopting the principle of pension adjustments aimed at maintaining the purchasing power, the principle was approved neither by the Finance Committee nor by CERN’s Council, both of which simply “took note” of it. The fact that subsequent adjustments may have compensated for the loss of purchasing power does not create a right to an automatic application of that principle.

D. In his rejoinder the complainant notes that the Governing Board of the Pension Fund was “opposed” to the extraordinary adjustment requested by the GAC on two grounds, namely, the fact that annual adjustments had been applied in accordance with procedures and that the extraordinary adjustment would lead to financial implications for the Fund. The defendant cannot now add further grounds to these. That reply does constitute a general decision causing injury, considering that the refusal to submit this proposal to the Finance Committee and to the CERN Council makes any pension adjustment impossible. He further explains that the impugned decision is in fact the bank statement of 6 December 2002, which constitutes an individual decision in application of the decision of 22 November, hence the indications given in his complaint form. The letter of 22 December 2000, however, is not a decision but merely an “information circular”. He would have no reason to challenge it, moreover, since it concerns the adjustment of pensions only for the period from August 1999 to August 2000.

On the merits the complainant submits that, while he has never suggested that salary adjustments should apply automatically to pensions, he does request that the principle of equal treatment with respect to inflation be strictly applied. Since the adjustment of pensions must take account of the criteria adopted for the adjustment of salaries, the five-yearly reviews of the latter should also be taken into consideration.

E. In its surrejoinder the defendant contends that the complainant’s underlying objective is to challenge the adjustment of pensions for the year 2001, decided by CERN’s Council in December 2000, and to circumvent the time limit by resorting to a procedural device. It reiterates that the individual decision applying the annual pension adjustment is constituted by the Pension Fund Administrator’s letter informing each pensioner of the rate of adjustment decided. The legal effect of this decision was not affected by the fact that it was contained in an information circular.

## CONSIDERATIONS

1. The complainant, who is President of the CERN Pensioners' Association (GAC), having been authorised to appeal directly to the Tribunal by the Chairman of the Governing Board of the Pension Fund, challenges what he considers to be the "decision" to reject his request for an adjustment of his pension. He contends in particular that, contrary to the view expressed by the Administrator of the Fund in his letter of 22 November 2002, the financial situation of the Fund in March 2001 was sound and that the rejection of his request for an extraordinary adjustment disregards the principle of equal treatment between active staff and pensioners, the principle of *patere legem quam ipse fecisti* and the principle of good faith.

2. The defendant objects to the receivability of the complaint. It argues that the impugned decision is not clearly identifiable, since it is impossible to tell from reading the complaint whether the complainant wishes to challenge the payment of his pension for December 2002, the reply of the Governing Board of the Pension Fund or the decision taken by CERN's Council to increase pensions by 1.4 per cent as from 1 January 2001, and communicated to the complainant by the Administrator of the Fund in a letter of 22 December 2000.

3. Despite some confusion in the complaint form, the Tribunal must discard this objection to receivability: it emerges clearly from the complaint, and even more so from the rejoinder submitted by the complainant, that the latter is challenging the individual decision of which he was notified via his bank statement of 6 December 2002 and that in support of his claims he is contesting the lawfulness of the general measure taken by the Governing Board on 22 November 2002 in response to the GAC President's request of 6 March 2001.

4. The defendant also maintains that the "payment of the pension as evidenced by the bank statement" does not constitute an administrative decision: only the decision by CERN's Council fixing the pension adjustment rate for 2001, as notified to all beneficiaries by the Administrator of the Fund in December 2000, was appealable. With regard to the rate applicable from 1 January 2001, the complainant, like all his colleagues, was notified of the decision increasing pensions by 1.4 per cent, and his appeal against that individual decision, which he failed to challenge in due time, is time-barred.

5. CERN rejects the complainant's argument based on an analogy between bank statements and payslips, which the Tribunal accepts do constitute individual administrative decisions open to appeal. It is true that a bank statement as such cannot be regarded as an administrative decision. But it appears from the explanations given by the defendant that monthly pension payments are not notified individually except when pensioners are informed of decisions concerning the rate of adjustment decided by CERN's competent bodies. In the circumstances, the Tribunal considers that, while the bank statement does not constitute a decision, it does reflect a decision taken to credit the complainant's account and, just like a payslip, this decision may be challenged by all legal means.

6. While the complaint is therefore receivable as an appeal against an individual decision causing the complainant injury, it is, however, unfounded. The complainant merely asserts that the reply given to the GAC's question concerning the desirability of an extraordinary pension adjustment was unlawful. In accordance with Article II.1.15 of the Regulations of the Pension Fund, however, it is CERN's Council which decides pension adjustments; and the individual decisions on pension rates have as their sole legal basis the general decisions taken periodically by CERN's Council, the lawfulness of which may indeed be challenged in the context of a complaint directed against such individual decisions (see Judgments 1000, 1451 and 2129). In this case, the complainant's objections concern only the lawfulness of the position advocated by the Governing Board of the Pension Fund, when it considered that it could not give its backing to the extraordinary pension adjustment requested by the GAC. Since this refusal to support the latter's request before CERN's competent bodies cannot be considered as a legislative act of general application, any pleas based on its alleged unlawfulness must fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.