

**SEVENTY-FOURTH SESSION**

***In re* ANDERSSON, DE DONATO,  
DUBAIL and GUILLET**

**Judgment 1204**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Lennart Andersson, Mr. Francisco de Donato, Mr. Georges Dubail and Mr. Joseph Guillet against the European Organization for Nuclear Research (CERN) on 18 February 1992 and corrected on 19 March, the Organization's single reply of 5 June, the rejoinder of 11 July from Mr. Andersson, Mr. de Donato and Mr. Guillet, Mr. Dubail's rejoinder of 21 July and CERN's surrejoinder of 2 September 1992;

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. By its weekly bulletin of 4 March 1991, No. 10/91, CERN informed its staff of general guidelines on promotion and advancement for 1990-91. They distinguish between normal promotion, double-step advancement and what they call "out-of-career" promotion. Out-of-career promotion is a means of advancement for officials of outstanding merit at the top step in their grade who cannot ordinarily go any further. The material paragraph of the guidelines says that promotions of that kind are to be allotted by division and "according to the number of those who satisfy the following conditions: staff members must be at least 50 years old in categories 3 and 5b, or 45 in categories 4 and 5c, and have reached the last step in the grade of their post".\* (\*Registry translation).

Each of the complainants' divisions proposed them for out-of-career promotion. In 1991 each of them applied for and were granted early retirement on negotiated terms.

In the weekly bulletin dated 22 July 1991, No. 30/91, the Organization announced that the 1991 "exercise" was over. Finding that their promotion had not gone through, each of the complainants asked the Personnel Division to tell them why. The answer was that for 1991 management had decided against out-of-career promotion for anyone who had been granted early retirement.

Letters of 12 August 1991 from Mr. de Donato, Mr. Dubail and Mr. Guillet and of 30 September 1991 from Mr. Andersson to the Director-General charged CERN with breaking the rules by refusing out-of-career promotion for a reason - the grant of early retirement - that the criteria in the guidelines did not cover. They made requests for review and asked the Director-General, if he refused, to treat their letters as lodging appeals.

By letters of 7 October 1991 the Head of Administration replied that in future there was to be no out-of-career promotion for anyone who got early retirement and their requests were therefore rejected; moreover, under the rules no appeal lay against refusal of such promotion, and so their cases could not go to the Joint Advisory Board on Promotion and Advancement. In a joint letter of 17 October to the Director-General they pointed out that what they were appealing against was not post classification or refusal of promotion but a flaw in the administrative process. They asked for new decisions and, if they were refused, an explanation of the reasons why. In letters of 20 November the Director-General said that though there was no actual rule disqualifying for out-of-career promotion someone who had been granted early retirement, such promotion was due only to officials "of outstanding merit"; their work had been "good, sometimes very good", but he found "no evidence of outstanding merit" in their case, and "in those circumstances" he held to his refusal of promotion. Those are the decisions under challenge.

B. The complainants have three pleas.

They submit, first, that the Director-General made a procedural mistake by failing to convene the Joint Advisory Appeals Board before ruling on their "appeals".

Secondly, he committed a mistake of law. He was wrong to refuse automatically the promotion in 1991 to anyone who had taken early retirement.

Misuse of authority is obvious from his letters of 20 November 1991: since he could not deny breach of the rules he relied on his discretionary authority. Moreover, sending each of the complainants the same answer - and an ambiguous one at that - made his stance implausible. His answers did not reflect their performance record and must have been actuated by determination to keep to his original decisions even if that meant changing the explanation for them.

Lastly, CERN disregarded their supervisors' recommendations for granting them out-of-career promotion.

CERN having caused them both material and moral injury, they ask the Tribunal to quash the impugned decisions, order resumption of the promotion process and award them damages and costs.

C. In its reply CERN answers all their pleas.

It submits that there was no flaw in the procedure. In their letters of 12 August and 30 September 1991 the complainants did not actually lodge appeals but merely gave notice of intent to appeal if CERN failed to grant them satisfaction. Indeed the Head of Administration told them in his replies of 7 October that because of the express bar in the CERN rules to challenging refusal of out-of-career promotion no appeal would lie to the Joint Advisory Appeals Board.

There was no mistake of law either. CERN dealt with their cases in strict compliance with its guidelines on promotions in 1991 and there were no grounds for entertaining their requests for review.

Nor was there misuse of authority: in his letters of 20 November 1991 the Director-General explained that out-of-career promotion was in any event unwarranted for want of evidence of their "outstanding merit". In saying so he just gave them a fuller explanation of the decisions in the Head of Administration's letters of 7 October: he neither changed those decisions nor replaced the original explanation of them with another. He took full account of their personal records.

The plea of failure to take account of their supervisors' recommendations is immaterial insofar as such recommendations are not binding on it.

Lastly, they have sustained no actionable injury.

D. The complainants rejoin that the impugned decisions show two mistakes of law. By refusing promotion in 1991 to staff who had taken early retirement the Director-General set a new condition that was not stated in weekly bulletin 10/91; and denying them access to the internal appeals body was a procedural error.

He did misuse his authority by replacing an explanation he acknowledged to be unlawful with another he put forward in the exercise of his discretion.

It is odd to set such little store by the duly substantiated recommendations and proposals of supervisors. Those recommendations amount to actual promises of promotion which CERN, in serious breach of good faith, failed to keep.

E. In its surrejoinder CERN denies acknowledging that the impugned decisions were flawed: they show neither mistakes of law nor misuse of authority. Supervisors' recommendations matter only insofar as they stay within the ambit of the rules. Here the supervisors were bound by the rule against out-of-career promotion for staff retiring early. Since CERN had made the complainants no promise their plea of breach of good faith is unfounded.

CONSIDERATIONS:

1. Each of the complainants applied to CERN for "out-of-career" promotion, had his application refused by the Director-General in a letter of 20 November 1991, and is impugning that decision. Since their complaints rest on

the same pleas and raise the same issues of law they may be joined to form the subject of a single ruling.

2. The background to the case is as follows. General guidelines on advancement and promotion of CERN staff for 1990-91 were published in a bulletin dated 4 March 1991. They provide for three sorts of promotion: normal promotion, double-step advancement, and "out-of-career" promotion. There were to be some 60 "out-of-career" promotions in 1990-91. Such promotion is intended for anyone who has reached the top step in his grade and whose performance is outstanding but to whom the ordinary provisions of the Staff Regulations on promotion do not apply.

According to the material paragraph of the bulletin, out-of-career promotions "are to be granted according to the number of those who satisfy the following conditions: staff members must be at least 50 years old in categories 3 and 5b, or 45 in categories 4 and 5c, and have reached the last step in the grade of their post".\* (\*Registry translation).

The complainants met those requirements but all of them applied for and were given in 1991 leave to take early retirement. They were all refused out-of-career promotion, and when they asked why, were told that it was at the Director-General's full discretion and, "being an exceptional form of advancement, is not ordinarily granted to anyone who has applied for early retirement" from the Organization.

The complainants were dissatisfied with that answer, which the Head of Administration confirmed in letters of 7 October 1991. Together they addressed a single letter to the Director-General on 17 October and after an unsuccessful attempt at mediation they got a reply in the letters of 20 November 1991, which the Director-General signed and which are the decisions they impugn. The letters said that, although the Staff Regulations did not expressly disqualify someone who took early retirement for out-of-career promotion, such promotion was in fact granted only for "outstanding performance". The letters to all the complainants added, in identical terms: "Your services at CERN were good, sometimes very good, but there is no reason to suppose that they were outstanding".

3. Though the complainants put forward many pleas, the Tribunal will take up only the one about mistake of law. Since it succeeds the impugned decisions are set aside anyway.

In the complainants' submission CERN's original decisions were taken for the unlawful reason of principle that early retirement disqualified out-of-career promotion, whereas the Director-General later confirmed the decisions on the quite different grounds that they were at his discretion.

The Organization retorts that in disqualifying some members of the staff for out-of-career promotion it was merely exercising the discretion inherent in managerial prerogative; the Director-General did not alter his original decisions but merely gave the fuller explanation that they would not have qualified for out-of-career promotion anyway because their performance had not been outstanding.

4. The Organization is mistaken. Although the competent authority has discretion to grant or refuse the promotion of staff who qualify under the material rules, it must abide by the rules, and whatever decisions it takes will be subject to judicial review. Its decisions must rest on materially correct facts and show no mistake of law or any abuse of authority. So as to determine whether they pass muster the rules have to be known to everyone and an organisation may not go beyond the duly published texts and resort to secret provisions that change the thrust of the ones it intended to treat as binding. Before it takes its discretionary decision it must compare the merits of all staff who qualify under the rules; provided it makes no obvious mistake in that comparison, only then may it properly exercise its discretion.

5. What the true basis of CERN's decisions may be in this case is in doubt. The Organization itself has given different reasons at different times for refusing the complainants out-of-career promotion. After a meeting with the Management Board on 13 June 1991 it was decided to disqualify anyone who was taking early retirement. The Head of Personnel and the Head of Administration confirmed in several letters that those were decisions by management. In the impugned decisions of 20 November 1991 the Director-General acknowledged that there was "no provision disqualifying anyone who took early retirement for out-of-career promotion". Yet he upheld the rejection of the complainants' claims on the grounds that their services had not been outstanding. Contrary to what CERN makes out, he did not give them a "fuller explanation" but told them in plain terms that their services had not been found outstanding and that "in those circumstances" he upheld the refusal of out-of-career promotion. In its submissions to the Tribunal the Organization goes back to its original explanation: its decision was that in view

of the purpose of promotion no-one who took early retirement could expect out-of-career promotion just when he was about to leave.

The conclusion is that the impugned decisions were in line with that so-called "general rule", of which the complainants were unaware, and in taking them CERN committed two mistakes of law. One was to apply to the complainants rules that had never been published and that it regarded as binding. The other was to defend its position ex post facto by saying that its reasons for rejecting the complainants' claims were connected with their performance, though there is no evidence of any comparative and analytical assessment of the kind that international officials are entitled to.

The impugned decisions are set aside and the complainants sent back to CERN for proper determination of their entitlement to promotion.

6. Though the complainants are claiming awards of damages they fail to show any particular injury. If they get promotion, that, and the financial consequences, will afford them sufficient redress. If they are not promoted they will not have suffered any injury unless the new decisions are again unlawful. For the time being there is no actual injury and they have no right to compensation.

7. The complainants seek awards of costs and the Tribunal grants them 1,000 Swiss francs each under that head.

#### DECISION:

For the above reasons,

1. The Director-General's decisions of 20 November 1991 are set aside.
2. The complainants are sent back to CERN for proper determination of their entitlement to out-of-career promotion.
3. Their other claims are dismissed.
4. CERN shall pay the complainants 1,000 Swiss francs each in costs.

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

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas  
E. Razafindralambo  
Michel Gentot  
A.B. Gardner