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

NINETY-SIXTH SESSION

Judgment No. 2276

The Administrative Tribunal,

Considering the complaint filed by Mr B. N. against the European Organization for Nuclear Research (CERN) on 13 January 2003, CERN's reply of 16 April, the complainant's rejoinder of 7 July and the Organization's surrejoinder of 10 September 2003;

Considering Article II, paragraph 5, 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. Information concerning the non-resident allowance can be found in Judgment 2205 delivered on 3 February 2003. It need only be recalled that, following the study of "staff members' financial conditions" carried out at CERN every five years, the Organization's Council decided, on 15 December 1995, gradually to reduce the non-resident allowance from 12 to 6 per cent for "newly-recruited" staff members, to be achieved by annual reductions of 0.5 per cent with effect from the starting date of an indefinite contract. Article R A 5.03 of the Staff Regulations reads as follows:

"The following conditions shall apply to the non-resident allowance of staff members, commencing from the time of award of an indefinite contract, until the non-resident allowance reaches the minimum value given in paragraph c) below :

a) For recipients of the family allowance, the non-resident allowance laid down in Article R A 5.01 shall be reduced each year by 0.5 percentage points.

b) For non-recipients of the family allowance, these percentages or amounts shall be decreased pro rata according to the table shown in Article R A 5.01.

c) In no event shall the amount of the non-resident allowance be lower than 6% or 4.5% of the basic salary of the staff member concerned, according to his family situation."

In December 1997 the Organization published Administrative Circular No. 31 concerning the non-resident allowance. In order to abide by the principle of acquired rights, it was stated in the circular that for staff members who had been granted an indefinite contract prior to 1 January 1996, as well as those who had obtained an indefinite contract after 31 December 1995 but who had been employed under a fixed-term contract prior to that date, the non-resident allowance would be paid in full.

The complainant, a French national born in 1966, joined CERN on 16 October 1992 as a fellow. He was subsequently offered a three-year contract of limited duration starting on 16 October 1994. On 8 July 1996 CERN offered him a three-year fixed-term contract starting on 1 August 1996. This contract was extended for a second three-year period, until 31 July 2002. On 29 June 2001, however, the Director of Administration informed the complainant that the Organization had decided to grant him an indefinite contract starting on 1 July 2001. This took the form of an amendment, dated 5 July 2001, to his contract of 1 August 1996. The amendment stipulated, under "Special conditions", that his "non-resident allowance [would be] subject to the conditions of application defined in Article R A 5.03 of the Staff Regulations", that the "annual reduction in the non-resident allowance [did] not give

rise to an amendment to his contract" and that "any change in his family situation affecting the amount of the non-resident allowance [would] give rise to an amendment to the contract". The complainant signed this amendment on 3 September 2001, adding the following reservation: "without prejudice to all my rights, and subject to the legality of the application to my case of the amendment to Article R A 5.03 concerning the reduction of the non-resident allowance".

By letter dated 4 September 2001, the complainant filed an internal appeal with the Director-General against the Organization's decision to apply the gradual reduction of the non-resident allowance to his case. In its report dated 15 August 2002, the Joint Advisory Appeals Board, to which the appeal was referred, found many instances of negligence by the Organization in its treatment of the case and unanimously recommended that the appeal should succeed and that the complainant should keep his full non-resident allowance. In a letter dated 14 October 2002, which constitutes the impugned decision, the Director of Administration informed the complainant that the Director-General had decided to reject his appeal.

B. The complainant points out that Article R A 5.03 does not specify to whom it applies. It is therefore necessary to consider the intention of the legislator. According to the complainant, the documents leading up to the Council's decision of 15 December 1995 show without doubt that the latter intended to apply the gradual reduction of the non-resident allowance only to "newly-recruited" members of staff, that is, those who joined the Organization after 1 January 1996. The complainant adds that this was how the Director-General and the Administration had interpreted the article in several communications both before and after the decision. These communications had led the staff members to believe that Article R A 5.03 applied only to "newly-recruited" staff. He says that the "sudden change of attitude" in Administrative Circular No. 31 of December 1997 therefore constituted a breach of the principle of good faith. By not excluding established staff members who had been granted a contract prior to 1 January 1996 from the reduction of the non-residence allowance, the circular breached Article R A 5.03, which is a higher ranking rule. It should therefore be considered null and void. Lastly, the complainant points out that, although the Tribunal in its case law does not recognise the maintenance of the amount of an allowance as an acquired right, there was nothing to stop the defendant Organization creating such a right internally, as it did in this case.

The complainant requests that the Tribunal set aside the impugned decision, order that the full amount of his non-resident allowance continue to be paid and award him costs.

C. In its reply CERN maintains that the complainant's interpretation of the Council's decision of 15 December 1995 is mistaken. The expressions used there, such as "future personnel" or "newly-recruited" staff, include persons already employed by the Organization but who could, on the basis of the contract policy introduced in 1994, apply for another post and be put through a new recruitment procedure after 1 January 1996. That was the case of the complainant.

Subsidiarily, the defendant asserts that Circular No. 31 complies with the Council's decision. It denies having acted in bad faith. Staff members were kept regularly informed and none of the communications to which the complainant refers gave the impression that the reduction of the non-residence allowance would not apply to staff members employed by the Organization prior to 1 January 1996. It points out that the Tribunal, in its Judgment 2205, recognised that the information provided had been clear and that the Organization had not breached the principle of good faith. It adds that the complainant, like any other staff member, is expected to be familiar with current regulations. The reservation entered by the complainant was unnecessary since he had no acquired rights to preserve. If he disagreed with the proposal made, he was at liberty to turn down the offer of an indefinite contract and thus retain the benefit of the full allowance.

D. In his rejoinder the complainant, quoting a statement by a representative of the Personnel Division at a meeting of the Standing Concertation Committee held on 15 November 1995, says that "a majority of [Committee] members had supported the proposal that non-resident conditions were acquired by all established staff members, and not only staff on fixed-term or indefinite contracts". He concludes that the Director-General had published Administrative Circular No. 31 "without taking into account the wishes of CERN's Council".

According to him, if Article R A 5.03 were interpreted literally, the non-resident allowance would be cut for all staff members who did not have an indefinite contract at 31 December 1995. The proof that such a strict interpretation is inadmissible was provided by the defendant itself, which made an exception to that rule by excluding holders of fixed-term contracts from the scope of the article. He reiterates, however, that the intention of

CERN's Council had been to exclude all staff members under contract at 31 December 1995, regardless of the nature of their contract. He points out that the Council had established a link between the non-resident allowance and the installation indemnity in the draft text which was submitted to a vote and which led to the adoption of Articles R A 5.03 and R A 7.01. The installation indemnity is payable only to persons "joining CERN from outside" when they take up their appointment. The two articles must therefore have the same sphere of application.

He maintains that CERN's interpretation of the terms "new recruits", "newly-recruited" and "future personnel" is mistaken. Moreover, the Organization's new contract policy is not relevant, since this case concerns a specific provision which is an exception to the general rule. Moreover, that policy is not enforceable since CERN staff has not been informed of its content. He points out that the disputed circular was published in December 1997, more than one year after he had obtained his fixed-term contract. He adds that, whereas Judgment 2205 addresses the issue of good faith from the point of view of the receivability of the complaint - the question there being to determine whether CERN had prevented the complainant from lodging an appeal by providing unclear information - in this case the plea of a breach of good faith concerns the merits of the case.

E. In its surrejoinder the Organization argues that the minutes of the meetings held by the Standing Concertation Committee in November 1995 show that, at that stage, no agreement had yet been reached on the sphere of application of the reduction of the non-resident allowance. According to the Organization, in the light of the in-depth discussions held by the Standing Concertation Committee, the Tripartite Employment Conditions Forum, the Restricted Tripartite Group, the Finance Committee and lastly the Council, it should have been clear to everyone that the gradual reduction of the non-resident allowance would affect every staff member considered as a "new recruit". Circular No. 31 is therefore lawful, since it merely confirms the Council's decision of 15 December 1995, and the complainant's arguments are based on a mistaken interpretation of that decision. It points out that the circular did not meet with any difficulty when it was adopted and the Staff Association never cast doubt on its legality.

The Organization feels that the complainant should have taken due account of the background against which the Council's decision was drafted and adopted. It maintains that the basic principles of its new contract policy - of which the staff was informed - apply equally to the complainant, who was put through a new recruitment procedure in order to obtain a fixed-term contract. It explains that the decision to reduce the non-resident allowance is in no way related to any of the many other measures adopted by the Council.

The Organization rejects the complainant's argument that Judgment 2205 deals with the issue of good faith within the context of the receivability of the complaint, and adds that the date of publication of Circular No. 31 is irrelevant since it merely confirmed the Council's decision of 15 December 1995.

CONSIDERATIONS

1. The complainant argues that the reduction of the non-resident allowance provided for in Article R A 5.03 of the Staff Regulations does not apply to him. He maintains that the intention of the legislator was that the reduction should apply only to staff members who joined CERN after 1 January 1996 and not to those who were already on the staff prior to that date. He adds that Administrative Circular No. 31, which stipulates that the non-resident allowance of staff members in his position should be reduced, should be considered null and void in that respect, since it is in breach of the higher-ranking Article R A 5.03.

He considers that the defendant breached the principle of good faith insofar as it led staff to believe, through officially circulated information (such as the Director-General's letter of 15 December 1995, the weekly bulletin of 18 December 1995 and the information document for staff members of February 1996) that Article R A 5.03 would apply only to new recruits.

With regard to acquired rights, the complainant, referring to the Tribunal's Judgment 1886, according to which there is no acquired right to the amount and the conditions of payment of an allowance, maintains nevertheless that there is nothing to stop the defendant creating acquired rights within its rules, as it did in the case of Article R A 5.03 by applying it only to staff members who joined CERN after 1 January 1996.

He requests that the Tribunal set aside the decision to dismiss his appeal, order that the full amount of his non-

resident allowance continue to be paid and award him costs.

2. The defendant, on the other hand, maintains that the complaint is unfounded. It considers that the complainant's arguments are based on a mistaken interpretation of the CERN Council's decision of 15 December 1995 introducing the new Article R A 5.03. In its view, the complainant is wrong to maintain that "it was the legislator's intention to apply the reduction of the non-resident allowance when granting an indefinite contract only to staff members joining CERN after 1 January 1996 and not to those already holding a contract [...] prior to that date". It argues that the expressions "future personnel" or "newly-recruited" staff used in the decision adopted by CERN's Council on 15 December 1995, which introduced the new Article R A 5.03, include persons already employed by the Organization but who may, on the basis of the contract policy introduced in 1994, apply for another post in the Organization and be put through a new recruitment procedure after 1 January 1996. It maintains that the complainant, who on his own initiative applied for a vacant post in March 1996 and went through a selection procedure to obtain a fixed-term contract as from 1 August 1996, should be considered as a "new recruit" within the meaning of the Council's decision of 15 December 1995. The gradual reduction of the non-resident allowance therefore applied to him from the moment he was granted an indefinite contract.

The defendant also argues that Circular No. 31 complies with that decision of 15 December 1995, since the reduction in the allowance applies to all persons recruited on fixed-term contracts after 1 January 1996. The allegations that Circular No. 31 is unlawful are unfounded, since they were based, in its view, on a false premise from the outset, namely a mistaken interpretation of the CERN Council's decision.

With regard to the charge that it breached the principle of good faith, the defendant, referring to Judgment 2205, considers that the complainant was duly informed of the Council's decision.

Lastly, it maintains that in the circumstances the complainant is unjustified in claiming an acquired right. Since he was recruited under a new contract issued after 1 January 1996, he cannot claim the maintenance of an entitlement arising from regulations which applied to his earlier contract.

3. On 15 December 1995 CERN's Council, on a recommendation by the Tripartite Group set up under the conciliation procedure, adopted a package of measures that included the reduction of the non-resident allowance. Staff members were informed of the decision on the same day in a letter from the Director-General, which stated that "for newly-recruited staff, [...] the non-resident allowance is to be reduced gradually, after the award of an indefinite contract, over a period of 12 years to reach half the present rates" (emphasis added).

In application of the CERN Council's above-mentioned decision, a new Article R A 5.03 was added to the Staff Regulations, as quoted under A above, and Administrative Circular No. 31 was published, which included the following provisions:

"**III. Members of the personnel receiving the non-resident allowance in full**

7. The non-resident allowance is paid in full :

a) Under the terms of Article R IV 1.21 : to staff members appointed on term, limited-duration or fixed-term contracts, to fellows and to paid associates.

b) In order to abide by the principle of acquired rights :

• to staff members awarded indefinite contracts before 1 January 1996;

• to staff members awarded indefinite contracts after 31 December 1995 but previously employed on fixed-term contracts.

[...]

IV. Members of the personnel receiving reduced non-resident allowances

8. These are staff members with indefinite contracts apart from those listed in § III b) above.

V. Conditions governing reduction of the non-resident allowance

[...]

10. The principle of an automatic yearly decrease in the non-resident allowance is set out in the amendment to the contract informing the staff member concerned of the award of an indefinite contract. [...]"

4. When it comes to interpretation, the primary rule is that words are to be given their obvious and ordinary meaning (see Judgment 1222, under 4) and any ambiguity in a provision should be construed in favour of staff and not of the Organization (see Judgment 1755, under 12). With the exception of Administrative Circular No. 31, the relevant texts suggest that the provisions concerning the reduction of the non-resident allowance, in the event of the award of an indefinite contract, apply only to "newly-recruited" staff members, that is, persons who joined the staff after 1 January 1996, the date at which the new rule took effect.

The reduction of the non-resident allowance, therefore, cannot concern persons who already belonged to the staff before the new rules came into effect. This is consistent with the CERN Council's intentions - as clearly expressed when it adopted the package of measures recommended in the Tripartite Group's report - with which the Director-General had to comply when establishing the criteria for applying Article R A 5.03 of the Staff Regulations.

5. The question is whether the complainant, who had already worked at CERN under various contracts and who obtained an indefinite contract starting on 1 July 2001, should be subject to the reduction of the non-resident allowance under the new provisions of Article R A 5.03 of the Staff Regulations.

Before answering this question, it should be made clear that the complainant's case is different from those considered by the Tribunal in its Judgments 1886 and 2205. In Judgment 1886, the Tribunal found that the complainant had knowingly accepted and signed a new contract which implied a reduction of his expatriation allowance. In Judgment 2205, it found that the complainant had not appealed in due time against the decision which was to lead to the reduction in the non-resident allowance.

In the case in hand, the complainant, who received an amendment to a contract dated 1 August 1996 granting him an indefinite contract starting 1 July 2001, expressed reservations as to the legality of the amendment to Article R A 5.03 concerning the reduction of his non-resident allowance and filed an appeal on 4 September 2001.

6. It appears from the evidence that the complainant already held a three-year contract of limited duration which had started on 16 October 1994. Consequently, notwithstanding the defendant's arguments concerning the introduction of a new contract policy and the new recruitment procedure which he was reportedly put through before being granted a fixed-term contract on 8 July 1996, he could not be considered as "newly recruited" after 31 December 1995.

7. Circular No. 31, which excluded from the reduction of the non-resident allowance only staff members holding an indefinite contract before 1 January 1996 and those who were granted an indefinite contract after 31 December 1995, but who were employed on a fixed-term contract prior to that date, and not those, like the complainant, holding a contract of limited duration before 31 December 1995, introduced a distinction between fixed-term contract holders and contract of limited duration holders which had not been provided for in the higher ranking rule to which it refers and is not in accordance with the intention expressed by the CERN Council.

8. The Tribunal concludes from the above that the complainant, who was already a member of the Organization's staff before 31 December 1995, should not be subject to the reduction of the non-resident allowance provided for in Article R A 5.03 of the Staff Regulations.

Therefore, without any need to consider the other pleas, the decision of 14 October 2002 must be set aside and the complainant's right to the full amount of the non-resident allowance must be recognised.

9. Since he succeeds, the complainant is entitled to costs fixed at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The complainant is entitled to the full amount of the non-resident allowance without gradual reduction.

3. The Organization shall pay the complainant the sum of 5,000 Swiss francs in costs.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.