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

100th Session **Judgment No. 2498**

The Administrative Tribunal,

Considering the complaint filed by Ms L.J. against the European Organization for Nuclear Research (CERN) on 28 September 2004 and corrected on 5 November 2004, the Organization's reply of 21 February 2005, the complainant's rejoinder of 23 March and CERN's surrejoinder of 31 May 2005;

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, who was born in 1939, holds dual French and Swiss nationality. She joined CERN on 1 November 1964 as a typist at grade 4 and was given an indefinite appointment starting on 1 November 1966. She retired on 30 September 2004.

When she was recruited, her "home station" was situated at a distance of more than 20 kilometres but less than 100 kilometres from Geneva and her place of residence lay outside the "local radius" (which ended 20 kilometres beyond the limits of the city of Geneva). As from 1 April 1966, the date she was promoted to grade 5, the complainant qualified under the January 1962 Staff Rules and Regulations for a B non-resident allowance payable to staff members in residential category B. This allowance was paid at a rate of 6 per cent of basic salary for heads of family (having a dependent spouse and/or children) and 4.5 per cent for other staff members. Although she was married, the complainant did not have head of family status, so that her allowance was paid at the rate of 4.5 per cent.

On 1 January 1968 new Staff Rules and Regulations came into effect. The definition of "local radius" was changed (being extended to 100 kilometres from Geneva), while residential category B was abolished. Under the new rules, the complainant no longer qualified for a non-resident allowance, since her home station now lay within the local radius. However, staff members who had received a category B non-resident allowance prior to 1 January 1968 were to retain the allowance until the termination of their appointments. The complainant therefore continued to receive the allowance at the rate of 4.5 per cent.

In 1973, the Organization decided to grant married women who were members of its staff the benefits to which only heads of family had until then been entitled. This led to a contract amendment effective as from 1 July 1973, by which the complainant was granted a family allowance and a child allowance. With regard to the non-resident allowance, the rate remained at 4.5 per cent.

By a letter of 4 December 2002, the complainant requested that the rate of that allowance be raised to 6 per cent of her basic salary, starting from "the date at which the entitlement to payment" of the allowance had arisen. On 27 January 2003 the Human Resources Division Leader replied that her allowance should indeed be paid at the rate of 6 per cent and he apologised on behalf of the Organization for the mistake. He informed the complainant, however, that the situation could be rectified only with respect to the last two years, that is from 1 December 2000, in accordance with Regulation R IV 1.59 on time-limits of claims. In a letter dated 19 March 2003, the complainant pointed out that she had submitted a claim in good time, in 1973, but that she had then been told orally that the rate could not be changed. She claimed fair compensation for the loss she considered she had incurred over some 30 years. The Director of Administration, on behalf of the Director-General, rejected that claim on 4 June 2003.

On 10 July the complainant filed a request for a review with mediation of that decision, in accordance with Chapter VI of the Staff Regulations. In his conclusions dated 12 September, the mediator proposed payment of the sum

suggested as a compromise by the complainant, that is half the 24,434 Swiss francs she considered she was owed. In a letter dated 9 October 2003, the Director of Administration informed the complainant that he had decided to maintain his decision.

The complainant filed an internal appeal on 9 December 2003. According to her, the Organization was to blame for the fact that she had not lodged a formal complaint within the time allowed, and it could therefore not argue that the appeal was out of time. She pointed out that at that time not only did she not receive a payslip every month but that those payslips did not show the rates. She added that in any case, the allowance should have been paid to her at the proper rate without her having to ask for it. Since the Administration had made a mistake, she could only assume that the rules regarding non-residence were not very clear. She now claimed the full amount of 24,434 francs, plus accrued interest.

The Joint Advisory Appeals Board, to which the matter had been referred, unanimously recommended on 2 June 2004 that the appeal be dismissed on the grounds that it was unfounded and that no exception could be made to the Organization's rules. In a letter of 28 June 2004, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to dismiss her appeal in accordance with the Board's recommendation.

B. The complainant contends that she is a victim of gender discrimination. According to her, the Staff Rules and Regulations were changed in 1973 in order to do away with discrimination and to grant the same benefits to all married members of staff, whether male or female. Yet in her case she considers that the discrimination continued, since from 1 July 1973 onwards married men received a non-resident allowance at the rate of 6 per cent while her own allowance was kept at 4.5 per cent.

She complains that the Appeals Board failed to take account of the purpose of her appeal. She says that it did not mention in its report either the testimony of her supervisor or a calculation prepared by a human resources officer in 2002 wherein the B non-resident's allowance at the 6 per cent rate was used.

The complainant asks the Tribunal to recognise that she is entitled to the non-resident allowance at the rate of 6 per cent as from 1 July 1973. She claims the sum of 24,434 francs, plus interest, in compensation for the loss suffered since that date, and 3,150 francs in costs.

C. In its reply the Organization contends as its main plea that the complainant is not entitled to the 6 per cent rate and therefore that her claim is unfounded. Even though after 1 January 1968 the complainant no longer qualified for a non-resident allowance, she continued to receive one; in CERN's view however, that did not give her the right to benefit from subsequent changes to the rules in that respect. Her only right was to continue receiving the allowance, in accordance with the relevant provisions of the 1968 Staff Regulations, and the terms of that benefit remained frozen at the rate applicable in 1962, that is, at 4.5 per cent. She was in no way entitled to the non-resident allowance provided for in the 1973 Regulations. It was by mistake and without justification that she was allowed the 6 per cent rate from 1 December 2000.

As a subsidiary argument, the Organization submits that the complainant's claim for the 6 per cent rate as from 1 July 1973 is time-barred. According to CERN, the complainant should have sent a formal request in writing to the Director-General within 30 days of notification of the 1973 contract amendment. As she did not do so – in accordance with Regulation R II 1.18 applicable at the time – she was deemed to have accepted the amendment. Moreover, the complainant never expressed any reservation regarding the rate applied to her and there is no trace in her personal file of the "inquiry" she allegedly made in 1973. Recalling the Tribunal's case law, according to which a time limit is a matter of objective fact, the Organization contends that the 1973 decision has become final.

In another subsidiary argument, the defendant organization refers to the regulations concerning limitation of claims, in particular Regulation R IV 1.59 which states that complaints regarding the calculation of the items shown on the payslip are not admissible after two years. Therefore, the complainant can no longer claim the payment of sums which, according to her, she has been owed since 1973. The Organization considers that it cannot be blamed for having followed its own rules or for refusing to waive them, since the application of the rules is essential for legal certainty. It concludes that the complaint is vexatious and asks the Tribunal to order the complainant to pay the costs.

D. In her rejoinder the complainant presses the pleas she put forward in the course of the internal appeal and

refers to Judgment 978 in which the Tribunal considered that an earlier provision of the Staff Rules would not be enforceable if it were discriminatory. She asks the Tribunal to recognise that it is possible for the parties to agree to settle and that no rule on time limits should enable an organisation to evade its obligations.

E. In its surrejoinder the Organization fully maintains its position and points out that it showed good will by not requesting that the complainant reimburse the sum paid to her by mistake. With regard to the accusation of gender discrimination, it comments that prior to 1973 the rules drew a distinction not between men and women but between unmarried members of the personnel and heads of family. A head of family was considered to be any member of the personnel with a dependent spouse and/or children, or any unmarried woman with dependent children. Furthermore, the calculation referred to by the complainant was in fact taken into consideration by the Appeals Board, which nevertheless was at liberty not to mention it in its report. Lastly, CERN queries the relevance of the case law referred to by the complainant and cites Judgment 51 where the Tribunal considered that the payment of a non-resident allowance at an earlier rate constituted an acquired right.

CONSIDERATIONS

1. The complainant was employed by CERN from 1 November 1964 until 30 September 2004, when she retired.

From 1 April 1966 she qualified for a B non-resident allowance payable to staff members in residential category B. When she first joined the Organization she lived outside the “local radius”, defined in the Staff Rules and Regulations of January 1962 as an area within a radius of 20 kilometres of the limits of the city of Geneva, where the Organization’s headquarters are situated. Her “home station” lay at a distance of more than 20 kilometres, but less than 100 kilometres, from Geneva. The complainant, who was married, was paid the B non-resident allowance at the rate of 4.5 per cent of her basic salary, while heads of family (i.e. those with a dependent spouse and/or children) were paid the allowance at the rate of 6 per cent. On 1 January 1968 a new version of the Staff Rules and Regulations came into effect, in which the “local radius” was defined as situated within a 100 kilometre radius around Geneva. As a result, residential category B was abolished.

In accordance with a transitional provision, staff members who, like the complainant, had previously been entitled to a B non-resident allowance were to preserve that benefit until the termination of their appointment, even though technically they no longer qualified for the non-resident allowance. The complainant therefore continued to receive the B non-resident allowance at the rate of 4.5 per cent of her basic salary. This rate remained unchanged when, on 1 July 1973, the rules governing the family and dependent child allowances were amended in order to remove any discrimination on the ground of sex.

2. On 4 December 2002 the complainant requested that the rate of her non-resident allowance be raised to 6 per cent of her basic salary, with retroactive effect from 1 July 1973. By decision of 27 January 2003, the Human Resources Division Leader agreed to her request but limited the retroactive effect of the decision to 1 December 2000 in view of the rules governing the limitation of claims. Following a request from the complainant that the parties find a compromise to compensate her for the loss she had incurred over some 30 years, on 4 June 2003 the Director of Administration confirmed, on behalf of the Director-General, the decision of 27 January 2003.

On 10 July 2003 the complainant filed a request for review with mediation. In his conclusions dated 12 September, the mediator advocated a settlement, while expressing doubts as to whether the complainant’s request satisfied the formal requirements. Having reviewed the matter, the Director of Administration informed the complainant in a letter dated 9 October 2003 that he did not intend to make an exception on an *ex gratia* basis to the provisions governing the limitation of claims and that he maintained his decision of 4 June 2003.

On 9 December the complainant filed an internal appeal against the decision of 9 October 2003, which was referred to the Joint Advisory Appeals Board. On 2 June 2004 the Board recommended dismissing the appeal on the grounds that the complainant was not entitled to the non-resident allowance at 6 per cent with retroactive effect and that, in that respect, the decision taken by the Human Resources Division Leader on 27 January 2003 was a mistake. The Director-General decided to follow the recommendation and the complainant was informed accordingly by letter of 28 June 2004 from the Director of Finance and Human Resources. That is the impugned decision.

3. The complainant criticises the Appeals Board. Firstly, it did not hear one of the witnesses she had put forward, and secondly, it failed to mention in its report either the statements of her other witness, who did testify, or a calculation of the loss she maintains she suffered as a result of the alleged discrimination.

This plea is unfounded. While it is regrettable that the Appeals Board did not mention in its report why it chose not to hear the first witness called by the complainant, that is not a sufficient reason, however, to conclude that the complaint should be allowed. It is clear that this evidence, like the calculation referred to by the complainant, was not relevant to the issue at stake, which was not the extent of the loss suffered by the complainant, but whether she was in principle entitled to compensation for such loss, especially in view of the rules governing the limitation of claims. For that same reason, the complainant’s argument that the Appeals Board failed to take account of the fact that the Administration’s misleading statements had led to her in 1973 not asking for the rate of her non-resident allowance to be adjusted must also be dismissed.

4. The complainant claims payment of the difference between the amount of non-resident allowance she continued to receive after 1 January 1968 under a transitional provision and the amount which, in her view, she would have received from July 1973 had she been a male employee. She maintains she was discriminated against and that, in view of the misleading statements by the Administration, she cannot be blamed for not having acted earlier.

(a) For its main plea the Organization argues that the complainant has no right to receive a B non-resident allowance at the 6 per cent rate which was formerly applicable to heads of family. It contends that, after that allowance was abolished in 1968, the complainant was merely allowed to benefit from a transitional provision recognising an acquired right. This transitional provision could not confer on her “the right to benefit from subsequent changes to the rules in that respect”.

The Tribunal cannot accept this argument. The transitional provision adopted in 1968 did give the complainant the right to continue receiving the B non-resident allowance until the termination of her appointment, even though that allowance had been abolished. As soon as it became clear that the difference in rates of the allowance was illegal, the complainant was obviously entitled to have this unequal treatment set right and to claim the allowance concerned at the same rate as that applied to male recipients in the same situation as she.

(b) In a subsidiary argument, the defendant maintains that the complainant’s claim is time-barred.

This argument does not stand. Staff members may at any time object to discriminatory treatment and request that the Organization put an end to it (see Judgment 978, under 20). The complainant was therefore entitled to claim the benefit of the 1973 provision that put an end to the discrimination at any time prior to her retirement, and the fact that she did not do so as soon as the provision came into effect is of no consequence.

That does not mean, however, that she could at any time obtain redress in respect of the unlawful situation with unlimited retroactive effect. Staff Regulation R IV 1.59 stipulates that “complaints regarding the calculation of the items shown on the payslip [...] are not admissible after two years”. The complainant was therefore certainly at liberty at any time to ask for the rate of her non-resident allowance to be set at 6 per cent by invoking the principle of equal treatment. Pursuant to the above-mentioned regulation, however, the retroactive effect of her claim should be limited to the two years preceding the date on which it was submitted. In limiting the retroactive effect of the claim submitted by the complainant in 2002, the Organization was merely applying a clearly stated provision, and there can be no objection to its decision.

The complaint must therefore be dismissed.

5. The Tribunal considers, however, that it need not accept the Organization’s claim for costs to be awarded against the complainant.

DECISION

For the above reasons,

The complaint and CERN’s counterclaim are dismissed.

In witness of this judgment, adopted on 4 November 2005, 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 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.