Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L. (No. 2)

v.

CERN

(Application for review)

136th Session **Judgment No. 4706**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4273 filed by Mr J. L. on 17 February 2021 and corrected on 23 February, and the reply of the European Organization for Nuclear Research (CERN) of 26 May 2021, the complainant having declined to file a rejoinder;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 4273, delivered in public on 24 July 2020, the Tribunal dismissed the complainant's complaint as well as various complaints and applications to intervene filed by other CERN staff members seeking to challenge their respective classification in the new career structure established following the five-yearly review of the conditions of employment of members of the Organization's personnel for 2015.

More specifically, in his complaint, in addition to an order setting aside the general decision of the Council of CERN of 17 December 2015 adopting the proposals made by Management following that five-

yearly review which "alter[ed] the career structure and the associated salary scale", the complainant sought an order setting aside the decision of the Head of the Human Resources Department of 30 June 2017 confirming his own classification at grade 5 in the benchmark job of "electromechanical technical engineer" and the decision of the Director-General of 25 May 2018 rejecting his internal appeal against the aforementioned decisions.

In his application for review, the complainant requests the Tribunal to reverse the dismissal of that complaint in Judgment 4273.

2. The Tribunal's consistent precedent has it that, pursuant to Article VI of its Statute, its judgments are "final and without appeal" and carry *res judicata* authority. They may be reviewed only in exceptional circumstances and on strictly limited grounds. The only admissible grounds therefor are a failure to take account of material facts, a material error (in other words, a mistaken finding of fact involving no exercise of judgement, which thus differs from misinterpretation of the facts), an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. On the other hand, pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea afford no grounds for review (see, for example, Judgments 4338, consideration 2, 3897, consideration 3, 3815, consideration 4, 3719, consideration 4, 3452, consideration 2, and 3001, consideration 2).

3. In support of his application for review, the complainant submits firstly that Judgment 4273 is tainted by a material error in that consideration 5 states that several arguments in his submissions to the Tribunal were not raised in the internal appeal proceedings. He argues that he did in fact "raise internally" most of the arguments in question.

4. Consideration 5 reads as follows:

> "In their submissions, the complainants expound at length on a number of legal considerations which relate to:
>
> – the non-adjustment of basic salaries;

– the gradual reduction in the staffing budget;

– the new social measures, which they analyse and criticise in detail. They conclude that these measures do not compensate for the reduction in the staffing budget and that CERN is not a 'leading employer in terms of employee welfare';

– the breach of the Noblemaire principle, according to which international organisations must offer their staff pay that will enable them to attract and retain nationals of countries where salaries are highest;

– the breach of a customary rule which requires the Organization to draw up in advance a comparative report on the economic and financial climate prevailing in the Member States which justified the non-adjustment of basic salaries.

The Tribunal notes that these arguments, which do not appear to have been raised in the internal appeal proceedings, are, for the most part, set out in the section of the written submissions presenting the facts of the case. It is not therefore clear whether the complainants wish to raise them as pleas challenging the lawfulness of the general decision of the Council of CERN of 17 December 2015.

In any event, the grievances listed do not relate to the part of the five-yearly review that dealt with the new career structure. They concern the parts relating to the non-adjustment of basic salaries and the new social measures, which are not the legal basis for the individual decisions impugned in these complaints. The individual impugned decisions relate to the complainants' assignment to a new benchmark job and a new grade under the new career structure. Although the case law allows a complainant to challenge the lawfulness of provisions of a general decision in the context of a complaint impugning an individual decision, she or he may do so only to the extent that the individual decision is founded on those provisions.

The complainants' aforementioned grievances are therefore irrelevant."

5. In support of his ground for review, the complainant produces, inter alia, an extract from the rejoinder that he had submitted to the Joint Advisory Appeals Board, which proves, in his view, that he had raised four of the arguments at issue during the internal appeal procedure.

However, the Tribunal notes that, although that document does refer to the grievances in question – albeit very briefly – the extract from the rejoinder corresponds to the introductory section of the rejoinder, entitled "Summary", and not to the section setting out the legal arguments submitted to the Board, entitled "Substance (law)",

which the complainant has not produced and in which those grievances should have appeared for them to be regarded as formally raised in that rejoinder. Furthermore, the fact, also cited by the complainant, that experts heard by the Board were questioned on matters relating to those grievances does not prove that the grievances were actually raised as such. The Tribunal cannot be regarded in any event as having committed a material error in finding that the arguments in question "[did] not appear to have been raised in the internal appeal proceedings", which, moreover, did not amount to a categorical assertion that they had not been.

It should further be noted that the alleged error was not likely to have a bearing on the outcome of the case, as required by the aforementioned case law in order to establish a ground for review. It is apparent from the second paragraph of consideration 5 quoted above that the comment in question was, as is evident from its exact wording that the arguments concerned "[besides] [did] not appear to have been raised in the internal appeal proceedings", a mere passing remark in support of the Tribunal's observation that an examination of the submissions before it did not allow it to determine with certainty whether the complainant intended to put forward some of these same grievances as pleas, since, again, they appeared in the section of those submissions recounting the facts, not the section putting forward the complainant's legal arguments. Moreover, the Tribunal did not in any event reject the grievances in question for any reason relating to these considerations, it being recalled that, under its case law, the fact that a plea has not previously been submitted in the internal appeal procedure does not render it irreceivable. These grievances were rejected, as stated in the third and fourth paragraphs of aforementioned consideration 5, on the ground that "[i]n any event" they did not relate to the part of the five-yearly review that dealt with the new career structure, which was the sole legal basis for the individual decisions challenged in this case, and were "therefore irrelevant". That reason for dismissal is not affected by the ground for review under discussion here, and it is precisely because the question as to whether those grievances had been raised in the internal appeal procedure had no bearing on their outcome that, in the present case, the Tribunal – which does not have the complete file

on that procedure – chose to use the loose formulation that they did not "appear to have been raised".

6. Secondly, the complainant does not accept the Tribunal's finding that CERN was not required to carry out a comparative study concerning the career structure based on data collected from other intergovernmental organisations, as required by paragraph 4.2 of Annex A 1 to the Staff Rules and Regulations for financial conditions – other than salaries – to be examined in the five-yearly review, since the career structure cannot be considered as a financial condition within the meaning of Chapter V of the Staff Rules and Regulations. According to the complainant, the career structure does constitute such a financial condition, and the Tribunal thus made an "incorrect finding [...] based on a factual error"[*].

7. On this point, having quoted all the relevant provisions of the Staff Rules and Regulations, the Tribunal stated in consideration 10 of Judgment 4273:

> "As for the new career structure, it should be borne in mind that it consisted essentially of two components: first, the replacement of the former career paths and salary bands with a new structure comprising only ten grades and, second, the introduction of a new merit recognition system. Neither the new allocation of grades nor the new merit recognition system can be considered a financial condition as defined in Article S V 1.01 [of the Staff Rules]. They therefore do not fall within the category of 'any other financial [...] conditions [other than salaries]' which, under paragraphs 2 and 4.2 of [...] Annex A 1, may be examined in a comparative study of other intergovernmental organisations.
>
> The Organization is not precluded from dealing with matters not listed in Annex A 1 during the five-yearly review, such as a new career structure, but in that case, the Organization does not need to collect data as specified in paragraphs 4.1 and 4.2 of Annex A 1.
>
> Moreover, it would be somewhat paradoxical if the salary increases resulting from promotion or recognition of merit had to be compared with those of other international organisations but basic salaries did not undergo such a comparison. In fact, basic salaries are to be compared with salaries in

[*] Registry's translation.

> the sectors corresponding to the Organization's 'main recruitment markets', pursuant to paragraph 3 of Annex A 1.
>
> Furthermore, an organisation is entitled to introduce a career system unlike that in any other organisation so that it can meet its own unique requirements. It is thus difficult to see how a comparison could be undertaken. That is the situation here, and the Organization rightly points out that such a comparison would be pointless since the career structure is a management tool to meet CERN's specific needs, which are different from those of other organisations."

8. In considering, after having taken into account all the relevant provisions of the Staff Rules and Regulations and Annex A 1 thereto, that the new career structure could not be regarded for the purposes of those provisions as a financial condition and did not therefore have to form the subject of a comparative study, the Tribunal conducted a legal assessment and an interpretation of the facts which cannot be challenged in an application for review.

Furthermore, the Tribunal observes that the complainant's various arguments challenging that finding are completely irrelevant. In particular, contrary to what the complainant submits, the Tribunal did not fail to take into consideration Administrative Circular No. 26 on merit recognition – to which, moreover, it referred on another point, as will be shown below – but that circular does not have the significance he attributes to it in this regard. Moreover, the complainant is plainly wrong to rely on Judgment 2941, concerning another organisation, in support of his contention as on any reading there is nothing in that judgment to indicate that the career structure constitutes a financial condition within the meaning of the rules applicable to CERN.

Lastly, the complainant takes issue with the Tribunal for having found that, as stated at the end of aforementioned consideration 10, a comparative study concerning the career structure would have been pointless, but that too is an interpretation of the facts that cannot be challenged in an application for review.

9. Thirdly, with further regard to the categorisation of the career structure as a financial condition and the corresponding requirement to carry out a comparative study thereon, the complainant criticises the

Tribunal for having, in his view, adopted a different approach from that adopted in Judgment 2778, which concerned CERN's five-yearly review for 2005, without having explained the reasons for that departure from precedent.

However, besides the fact that the Tribunal is not required to explain systematically why it may deem necessary in a case to depart from a comparable precedent, the inadequacy of the reasons given for a judgment is not, in any event, one of the grounds for review recognised in the case law, an exhaustive list of which has been provided above.

Moreover, the complainant is wrong to consider that Judgment 4273 represents a departure from the approach adopted in Judgment 2778 as the latter judgment did not state that the career structure as such constituted a financial condition within the meaning of the relevant provisions. Furthermore, although aforementioned Annex A 1, in the version in force at the time of the 2005 five-yearly review, expressly provided for the possibility of a comparative study in respect of the career structure, that particular provision was amended in 2007 – as indicated in Judgment 4273, consideration 11 – so as to remove the reference to that possibility, meaning that in this respect the 2015 five-yearly review took place in a different legal framework. Lastly, although the complainant observes that in Judgment 2778 the Tribunal took into consideration the overall impact of various alterations in conditions of employment while in Judgment 4273 it regarded as irrelevant the arguments unrelated to the central issue under discussion, namely the new career structure, that difference owes solely to the respective nature of the disputes before it. The case which gave rise to Judgment 2778 concerned criticism of a failure to raise the basic salary scale, the examination of which involved ascertaining whether the impact of that decision was offset by other measures affecting the level of staff remuneration, whereas the sole purpose of the complaints on which the Tribunal ruled in Judgment 4273 was, as stated, to challenge the complainants' classification in the new career structure, which did not involve examining the changes that had affected other conditions of employment.

This last consideration also leads the Tribunal to dismiss as unfounded the complainant's other plea that, by excluding particular issues from its assessment, the Tribunal failed to take account of "determinative material facts that would have had a decisive bearing on the outcome of the case".

10. The complainant also criticises the acceptance in the contested judgment that CERN could decide not to carry out a comparative study concerning the career structure even though the performance of such a study was originally planned in Management's proposal for the five-yearly review approved by the Council on 19 June 2014. He submits that the Tribunal "failed to consider whether Management's decision to drop the study was *ultra vires* in nature, given that the Administration had clearly not been authorised in advance by the Council to reverse its original decision".

However, after accepting the Organization's explanation that the study in question was included in the proposal approved by the Council by mistake and then dismissing the plea that dropping the study breached the principle of estoppel and the principle that similar acts require similar procedures, in consideration 13 of the contested judgment the Tribunal found that "by approving [on 17 December 2015] the five-yearly review, which set out in detail the procedure followed, the Council [had] implicitly but unambiguously endorsed that procedure". In so ruling, the Tribunal clearly intended to find that Management's failure to comply with the decision initially adopted by the Council was not, in any event, such as to render the decisions impugned by the complainant unlawful, given that the procedure was approved by the Council itself, which rendered the complainant's aforementioned objection moot.

11. Fourthly, the complainant submits that the contested judgment is tainted by a "factual error" concerning the evaluation of the financial injury which he considers he has suffered.

In this respect, the complainant firstly criticises the Tribunal for having wrongly considered that he had calculated the loss of income he attributed to the new career development rules on the basis of the maximum level of pay he could have achieved under the former salary scale, whereas the loss he alleged actually referred to the minimum salary that, according to him, he would have automatically received at the end of his career.

In the first place, apart from the fact that the complainant is in fact seeking to use this argument to challenge the Tribunal's interpretation of his written submissions, which cannot be properly challenged in an application for review, it is apparent from the file of the case which gave rise to Judgment 4273 that the complainant's argument on this point was at least partially based on the comparison of the maximum remunerations that could be attained in the two successive career structures. Moreover, the Tribunal notes in that regard that, in the extract from the rejoinder to the Joint Advisory Appeals Board produced in the present proceedings, the complainant referred to a comparison made on that basis when he complained that "[e]xceptional career path extensions [had been] abolished" in the reform resulting from the five-yearly review and that "[t]he salaries that could potentially be paid at the end of careers [would] therefore be lower than those that could be paid in the previous career paths".

In the second place, consideration 19 of the contested judgment shows that, in any event, the Tribunal compared various aspects of the complainant's former career situation and his career situation resulting from the reform, and not just his prospective maximum salary in each situation.

This argument cannot therefore be accepted.

12. The complainant also challenges the response given in the contested judgment to the plea that, by abolishing the former career development system, the reform at issue unlawfully put an end to a customary practice whereby CERN staff members received an automatic advancement in step every year.

On this point, in consideration 20 of the judgment, after noting that the Organization disputed the existence of such automatic advancement in the previous system, the Tribunal found that:

> "In any event, it must be noted that Administrative Circular No. 26 (Rev. 11) of November 2016 on merit recognition put an end to any practice to this effect. According to the Tribunal's case law, an administrative practice cannot continue to apply when it has been expressly abolished by a legal provision (see Judgment 3524, [consideration] 5)."

According to the complainant, the contested reform did not in fact put an end to the practice in question, which he disputes was prohibited by Administrative Circular No. 26, and the principle established in the case law thus recalled therefore does not apply.

However, in finding that this circular prevented the continuation of the alleged customary practice and that, as a result, the practice could not in any event be properly relied on, the Tribunal made a legal assessment which is plainly not open to challenge in an application for review.

This ground for review is therefore inadmissible.

13. The complainant also maintains that the abolition of the alleged practice in question has caused him financial loss. Apart from the fact that this again is not an admissible ground for review, the circumstance – even assuming it were established – that the new provisions were less favourable to him in this respect is, given the advantages otherwise offered by those provisions described in consideration 19 of the judgment, clearly not sufficient in itself to invalidate the Tribunal's finding that "the new career structure does not adversely affect the balance of the [complainant's] contractual obligations and does not alter a fundamental term of employment in consideration of which [he] accepted [his] appointment" and that it "has not, therefore, breached [his] acquired rights".

14. Fifthly and lastly, the complainant submits that the contested judgment is tainted by a procedural flaw in that in the course of the proceedings the Tribunal requested CERN to supply additional information

without notifying him of those requests or making available to him the information obtained from the Organization.

It is true that, during the proceedings relating to a series of similar complaints which included that of the complainant, the Tribunal asked the Organization, firstly, to inform it whether those of the staff members concerned who had undergone career reviews – which was not the case for the complainant – had lodged requests for review and, as the case may be, internal appeals against the decisions taken following those requests for review, and, secondly, to provide a previous version of aforementioned Annex A 1 in order to confirm the content of a 2012 amendment to the provisions thereof, to which the Organization had referred in its submissions. It is also true that these requests and the resulting communications from CERN dated 16 April and 14 May 2020 were not brought to the attention of the complainant's counsel before the public delivery of the contested judgment.

However, it cannot be considered that this action constituted, in the present case, a breach of the adversarial principle, since the requests made by the Tribunal to the Organization sought only the communication of purely factual objective information and the provision of a copy of a legal text and could not, by their nature, give rise to any dispute or meaningful discussion. The proceedings relating to the case were therefore not affected by any flaws.

In any event, it should be noted that a flaw of this kind is not one of the grounds for review that may be admitted by the Tribunal, such as exhaustively listed in the case law referred to in consideration 2, above.

15. It ensues from the foregoing that the complainant's application for review is, for the main part, merely an attempt to re-litigate matters that were conclusively decided by the Tribunal in Judgment 4273 and must be dismissed.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 2 May 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ