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

SEVENTY-FIRST SESSION

In re LANGELEZ

Judgment 1104

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 13 November 1990, the Organization's reply of 4 February 1991, the complainant's rejoinder of 5 April and CERN's surrejoinder of 8 May 1991;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal, Articles R II 4.19 and II 5.01 of the CERN Staff Rules and Regulations and paragraphs 16 and 17 of CERN Administrative Circular No. 14;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant joined CERN in 1970 as a mechanic at grade 5. At first he did occasional shift work but in 1971 CERN's medical service found him unfit for it for several months. In 1972 he went on a standard work schedule as a technical draughtsman but returned to his work as a mechanic in 1973. In 1976 CERN transferred him to a particle-accelerator operator's post requiring regular shift work. In 1983 a new rota system was brought in and the number of shifts in each work cycle was raised from five to seven. In 1985 his own doctor wrote that "on occupational grounds" his chances of contracting an ulcer were "very high".

During a routine checkup in 1988 the medical service found him unwell and on 16 March 1988 declared him unfit for shift work for three months. After review it described him on 22 June as permanently unfit for shift work. In July the head of his division had the matter put to the Joint Advisory Rehabilitation and Disability Board. On 19 August 1988 the medical adviser confirmed that he should be permanently relieved of shift work. On the Board's recommendation the Director-General declared him on 3 October to be "handicapped with respect to his post as far as it concerns shift work". On 22 November he appealed against that decision and on 30 November invited the Board to declare his condition service-

incurred. The Director-General having asked for a further opinion the Board confirmed on 10 February 1989 its view that he was unfit for shift work. By a letter of 15 February the Director-General upheld the decision of 3 October 1988 and asked him whether he wished to press his appeal. He replied on 9 March that he did and later submitted opinions from two doctors saying he was fit for shift work.

In its report of 19 July 1989 the Joint Advisory Appeals Board, to which his appeal had been referred, said that it found no breach of the rules but recommended an independent medical examination under paragraph 17 of Administrative Circular 14. On 10 August 1989 the Head of Administration accepted the Board's recommendations and agreed to examination of the complainant by an independent medical expert.

The expert having been agreed on by both parties, the medical service invited him to answer four questions about the complainant's physical and psychological capacity for certain duties involving shift work and the possible causes of his earlier ailments. By a letter of 17 November 1989 to the chairman of the Disability Board he objected to CERN's unilateral determination of the expert's terms of reference. On 28 February 1990 he lodged another appeal. In its report of 12 July the Appeals Board held there had been no breach of the rules in the terms of reference and again recommended rejecting his appeal. By a letter of 15 August 1990 the Head of Administration announced the Director-General's acceptance of that recommendation and warned the complainant that he would be liable to disciplinary action under Article II 5.01 of the Staff Rules if he refused to undergo the examination. He is challenging both the Board's report of 12 July 1990 and the letter of 15 August.

On 4 October 1990 he reported for the examination and was found unfit for shift work; the expert also described

his 1988 illness as not service-incurred.

B. The complainant submits that, the internal means of redress having been exhausted, his complaint is receivable.

On the merits he contends that the Administration based its determination of the medical expert's terms of reference on a misconstruction of the material rules. Paragraph 17 of Circular 14, by virtue of which the parties agreed to the appointment of the expert, reads:

"If one of the parties does not accept the other's conclusions, the Director-General ... will ask the medical practitioners appointed by him and by the person concerned to discuss the case between them in order, if possible, to come to an agreement. If they fail to do so, he shall ask them to appoint an expert to decide the matter."

By directing the expert to matters other than those the parties had discussed CERN broke its own rules. It asked for the expert's opinion on whether his ailments were "occupational", an issue his own doctors had never addressed. To slip it in belatedly was a serious breach of the appeal procedure in paragraph 16.1 of the circular. So was the question about his psychological capacity for running a particle-accelerator since such capacity had never come up either and the Organization's medical service had never assessed it. Besides, both parties should agree to an expert's terms of reference according to broad principles of law.

The complainant wants the Tribunal to declare that the expert's terms of reference are contrary to the Organization's own rules and to those principles, that they should not be just a medley of whatever questions the parties want, and that neither party may depart from the original issues by raising questions in disregard of the other's procedural rights.

C. In its reply CERN submits that the complaint is irreceivable. Under Article VIII of the Statute the Tribunal is competent only to quash a decision or order the performance of an obligation, whereas the complainant seeks relief in the form of declarations. Besides, he has not challenged a final decision within the meaning of Article VII, since one of the items he impugns is merely a recommendation by the Appeals Board and the other just prepares for a later decision. Neither constitutes "an act deciding a question in a specific case", to quote Judgment 112, nor one adversely affecting him.

CERN's pleas on the merits are subsidiary. Paragraph 17 of Circular 14 requires neither side to agree to the questions to be put to the expert. Both parties are free to submit any questions that may serve to resolve the dispute. The complainant never chose to do so. The questions CERN put to the expert were relevant and in any event within the Director-General's authority under paragraph 16 of the circular and Article R II 4.19 of the Staff Regulations, which empowers him to require staff to undergo at any time examination by a doctor of CERN's choosing.

D. In his rejoinder the complainant answers the Organization's pleas of irreceivability which he submits misrepresent his claims: he does want the quashing of a decision that adversely affects him.

He seeks disclosure of medical records in his personal file.

E. In its surrejoinder CERN submits that the rejoinder puts forward no new argument. His application for disclosure of his medical records is at odds with his contention that the dispute rests on administrative and not medical grounds.

CONSIDERATIONS:

1. CERN has employed the complainant as a mechanic since 1970. Having had his work routine altered, he began in 1985 to suffer from stomach ailments. His health failed to improve. The Joint Advisory Rehabilitation and Disability Board and then the medical adviser of CERN recommended declaring him "handicapped with respect to his post as far as it concerns shift work". By a decision of 3 October 1988 the Director-General accepted the recommendation.

On 22 November 1988 the complainant filed an internal appeal with certificates from his doctors in support. The Joint Advisory Appeals Board recommended rejecting his appeal and the Director-General did so on 15 February 1989.

The parties then decided to apply paragraph 17 of Administrative Circular 14, which provides that in case of disagreement the medical practitioners appointed by each of the two parties may be asked to appoint an expert to decide the matter. In this case the two doctors appointed as expert a professor of the Faculty of Medicine of Lyons.

2. It was at that point that the matter now at issue arose.

Several days after the case had been referred to the medical expert the medical service of CERN wrote a letter asking him to answer the following four questions which it regarded as essential to the settlement of the dispute:

"1. Was it right and warranted to decide in 1988 to remove Mr. Langelez from his duties and may that decision be upheld?

2. Is he fit for shift work and, if so, what should his working schedule and arrangements be?

3. Quite apart from his physical fitness, is he psychologically fit to serve as a member of a shift team? Does he have the emotional stability and traits of personality required for operating a particle-accelerator or supervising high-precision equipment (thermal and freezing plant) entailing shift work?

4. May the ailments he suffered from in 1988 be treated as service-incurred and as occupational illness within the meaning of circular 14 and, if so, what are the degree of liability and rate of disability?"

It is not denied that neither the complainant nor his doctors saw that letter beforehand. He objected on the grounds that the expert's terms of reference ought to have been determined by agreement between the medical practitioners appointed by both parties and that two of the questions, being irrelevant, ought to be struck out. He therefore refused to undergo examination by the expert.

CERN disagreed on the grounds that each side might frame the questions it thought relevant and that the complainant too might put any questions he wished. The Organization also ordered him to undergo examination or incur the risk of disciplinary sanction.

The complainant appealed again on 28 February 1990 to the Director-General and the case went to the Joint Advisory Appeals Board. In a report of 12 July 1990 the Board recommended rejecting his appeal. By a letter of 15 August 1990 the Head of Administration informed him of the Director-General's endorsement of the recommendation and warned that his further refusal to undergo the examination would be treated as misconduct and a breach of the Staff Rules and Regulations.

The complainant is objecting both to the Board's report of 12 July and to the decision of 15 August 1990.

3. The Organization submits that the complaint is irreceivable.

Insofar as the complainant is challenging the Board's report CERN is right. The Tribunal is not competent under its Statute to rule on the lawfulness of a report or recommendation by an advisory body. That is the case law, and no more need be said on the matter.

Whether the complaint is irreceivable as to the decision of 15 August 1990 is not so straightforward. CERN makes out that the decision is not of the kind the Tribunal may review under Article VII of its Statute: it does not rule on a matter affecting the complainant but just prepares for a decision the Organization may take later if the medical expert's findings so warrant.

Although merely preparatory decisions are not ordinarily actionable, this case may be distinguished in that the complainant has been given a warning which in itself causes him injury.

Both by virtue of Article VII and in the interests of justice the complaint will be treated as receivable.

4. Paragraph 17 of the circular does no more than lay down a procedure for appointing a medical expert, with the parties' agreement, to give an opinion as the basis for resolving dispute. The procedure does not prevent the parties from putting to the expert whatever questions they think that purpose requires.

CERN has not gone beyond the limits of what is proper. The four questions it put to the expert are relevant to the

dispute and the two sides may question him, either directly or through their doctors, on particular points within his terms of reference. In this case the questions CERN put do not deprive the complainant of any safeguard. Besides, once the expert has reported and the administrative decision has been taken he may submit a further complaint bearing on the dispute as a whole.

5. The present dispute is prior to examination of the complainant by the expert. At this stage the medical records are immaterial to the Tribunal's ruling and his application for their disclosure is therefore rejected.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.