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

SEVENTY-NINTH SESSION

In re S.-Z. (Nos. 2 and 3)

Judgment 1425

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. D. S.-Z. against the European Organization for Nuclear Research (CERN) on 17 February 1994 and corrected on 22 April, CERN's reply of 27 July, the complainant's rejoinder of 14 October and the Organization's surrejoinder of 16 December 1994;

Considering the third complaint filed by Mrs. D. S.-Z. against CERN on 22 April 1994, CERN's reply of 27 July, the complainant's rejoinder of 14 October and the Organization's surrejoinder of 16 December 1994;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Facts relevant to this case are to be found under A in Judgment 1212 of 10 February 1993 on the complainant's first case. She joined CERN on 4 February 1991 and on 4 March was granted a three-year appointment as a secretary in the Director-General's office. The confirmation of her appointment was subject to six months' probation. On 26 April 1991 she was taken ill at work and has since been unable to resume duty. On 28 June the head of the Director-General's office and the Adviser to the Director-General wrote an adverse report on her performance. On 12 November the Leader of the Personnel Division informed her that her appointment was to end on 31 January 1992. The Tribunal quashed that decision in Judgment 1212 and reinstated her in her contractual rights. It said: "If she cannot go back to work the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons".

On 7 January 1992 the complainant had asked the Director-General to recognise that her illness was service-incurred. In a medical opinion of 14 April CERN's medical adviser stated that it was not. Challenging that opinion, the complainant applied to the Director-General in a letter of 30 April for medical arbitration in accordance with point 17 of circular 14 of April 1988. Failing agreement on the appointment of an expert, the complainant asked the Director-General on 8 October 1992 to name one. He named a psychiatrist, Professor A. Raix, on 19 February 1993 after consulting the Joint Advisory Rehabilitation and Disability Board. In a letter of 5 March to

the Leader of the Personnel Division the complainant expressed strong objections to the choice.

In accordance with Judgment 1212 and by a letter of 12 March 1993 the Director of Administration informed the complainant that she was reinstated and must undergo a medical examination before being given a new assignment.

On 22 June the Leader of the Personnel Division referred the matter to the Disability Board in accordance with Regulation R II 4.16 of the CERN Staff Regulations. Under that Regulation the Director-General decides after consulting the Board whether or not to "retain" someone who has had a total of 24 months' sick leave in 36 months.

By a letter of 19 July 1993 the Director of Administration informed the complainant that her appointment, which was to expire on 3 March 1994, was extended by three months pending the findings of the medical examination for the "sole purpose" of letting her finish probation "if necessary and if possible".

In a letter of 17 September 1993 the complainant pointed out to the Director that if she proved satisfactory she would be entitled at the very least to work out her appointment.

In his report of 26 October to the Leader of the Personnel Division the medical expert concluded that the complainant's illness was not service-incurred and that "the remaining functional capacity and the type of activity possible cannot be defined since there has been no consolidation [of the illness]". By a letter of 1 November the Leader of the Personnel Division informed the complainant of the Director-General's decision not to treat her illness as service-incurred.

By a letter of 24 November, which is the first decision she impugns, the Director of Administration notified to her the Director-General's decision not to extend her appointment beyond 3 June 1994. By a letter of 1 December 1993 to the Director she objected to that decision on the grounds that it was inconsistent with Judgment 1212.

By a letter of 8 December 1993 to the Director-General she applied under point 18 of circular 14 for referral to the Disability Board of the question as to whether her illness was service-incurred. The Board made two recommendations in two reports of 17 February 1994: to let her go after the expiry of her appointment because of the state of her health and to confirm the Director of Administration's decision of 1 November 1993. By a letter of 15 March 1994 the Director of Administration informed the complainant of his decision to endorse the Board's recommendations as to the origin of her illness. On the same date he also informed her that she would not be kept on after 3 June 1994. That is the second decision she is impugning.

On 31 March the complainant lodged an internal appeal against the Director of Administration's decision of 15 March 1994 not to treat her illness as service-incurred.

On 14 April, in accordance with Regulation R II 4.20 of the Staff Regulations and Article II 4.02 of the Rules of the Pension Fund, the two medical advisers of CERN established the complainant's unsuitability within the meaning of Article II 4.01 of the Pension Fund Rules, which confers entitlement to a pension for unsuitability.

B. The complainant objects to the termination of her appointment on grounds of unsatisfactory work, whether it derives from the decision of 24 November 1993 or that of 15 March 1994. She has three pleas.

First, CERN disregarded res judicata. The decision in the letter of 24 November 1993 rests solely on the complainant's performance, declared unsatisfactory in the staff report of 28 June 1991, though she has been unable to go back to work since falling ill. Judgment 1212 meant that if CERN decided to end her appointment it was bound to do so on the grounds of incapacity for medically certified reasons. It not only terminated her without awaiting the outcome of the proceedings to determine the nature of her illness, but gave a reason different from the one required by the Tribunal.

Secondly, she submits that the reason given for her dismissal, namely that her work was unsatisfactory, is unsound. She cites a general principle, which she says the Tribunal's case law bears out, that an organisation may not on any but medical grounds end the appointment of someone who is on sick leave. What is more, CERN was unable to assess her work, as the Director of Administration expressly acknowledged in his letter of 24 November 1993. The staff report of 28 June 1991, on which the impugned decision relied, was not drawn up by the competent authority, rested on blatant misappraisal, overlooked essential facts and was the outcome of a flawed procedure.

Thirdly, the decisions of 24 November 1993 and 15 March 1994 are unlawful. The former was taken while the Disability Board was still discussing whether or not to "retain" her. Yet under Regulation R II 4.16 the Director-General may not take a decision until he has had the Board's opinion. If the Tribunal were to treat the letter of 15 March 1994 as the impugned decision CERN would have failed to give the six months' notice required in Regulation R II 6.02 of non-renewal of a fixed-term appointment.

The complainant submits that the decision not to end her appointment for certified medical reasons has caused her serious material injury because it deprives her of a pension for incapacity and of full social coverage. She asks the Tribunal to quash the impugned decision; order CERN to let her finish probation by reinstating her or, failing that, to grant her proper redress; and award her moral damages and costs.

C. In its reply the Organization submits that the complainant's third complaint is irreceivable. The decision of 15 March 1994 confirms the one of 24 November 1993 and so is a mere "procedural formality". In any event the complainant failed to exhaust the internal means of appeal against the decision of 15 March 1994.

On the merits CERN maintains that it did execute Judgment 1212 properly. The Tribunal's intention was that the complainant should get social coverage under the material rules. The medical enquiry established that her illness was not service-incurred. Under Articles II 3.01 and II 3.02 of the Rules of the Pension Fund payment of an incapacity pension could be made only in the event of dismissal for medically certified incapacity if her illness was consolidated. But it was not. As to the pension for unsuitability, provided for in section 4 of the same Rules,

according to Article II 4.04 it does not apply in the event of dismissal for medically certified incapacity. Dismissing the complainant on such grounds amounted to denial of social coverage.

CERN rejects the complainant's objections to the lawfulness of the grounds for the decision of 24 November 1993. It was not a decision to dismiss her but a decision not to renew her appointment. In Judgment 1149 (in re Baillod) the Tribunal held that a staff member's appointment may end while he is on sick leave. What led the Director-General to take the decision of 24 November 1993 was the lack of any prospect of her going back to work, since she had been on sick leave since 26 April 1991. CERN also rejects the plea that the staff report of 28 June 1991 was unlawful.

It denies breach of due process in reaching the decision of 24 November 1993: it was not a decision about whether to keep her on and so it called for no consultation of the Disability Board. The procedure intended to determine whether to keep her on became a mere formality once it had been decided not to renew her appointment. The requirement of notice does not apply to a decision, like the one of 15 March 1994, whether to keep someone on.

The decision not to dismiss her on grounds of medically certified incapacity caused her no material injury: she has been granted a pension for unsuitability, over and above all the other moneys she has been paid, in return for only 12 weeks' actual work.

D. In her rejoinder the complainant points out first that she was entitled anyway as a staff member to most of the sums CERN mentions. The Tribunal's ruling that if she was dismissed it should be for medically certified reasons was actuated by considerations of elementary compassion.

She presses her pleas about breach of due process and breach of res judicata. Neither the decision of 24 November 1993 - to dismiss her for professional incompetence - nor the one of 15 March 1994 - confirming that her appointment ended by virtue of non-renewal - squares with Judgment 1212. If the implied reason for the decision of 15 March 1994 was medically certified incapacity, CERN should have acted accordingly and granted her a pension not for unsuitability, but for incapacity. The only criterion for distinguishing between incapacity and unsuitability is the circumstances in which an appointment is terminated. In any event an illness which is sufficiently consolidated to prevent someone from returning to work is bound to warrant the grant of a pension for incapacity.

E. In its surrejoinder CERN maintains that it was unable to end her appointment lawfully on grounds of medically certified incapacity without depriving her of entitlement to any kind of pension, since according to the medical expert's report of 26 October 1993 her illness was not consolidated.

CONSIDERATIONS:

1. The complainant joined the staff of CERN on 4 February 1991 as a secretary in the Director-General's office. After one month's trial CERN gave her a fixed-term appointment for three years from 4 March 1991, the first six months to be probationary. On 26 April 1991 she fell

ill at work and went at once into hospital. Being unable to return to work, she was put on unlimited sick leave. In July 1991 she learned that the Administration had extended her probation to 31 January 1992, when her future with the Organization would be decided. CERN's medical officer examined her on 9 August 1991. She was given notice on 12 November 1991 of the decision to dismiss her at 31 January 1992. In Judgment 1212 of 10 February 1993 the Tribunal set aside that decision on procedural grounds. It said under 7:

"Even though the usual period of probation has expired, the Tribunal will in the circumstances set the decision aside so that the proper procedure may be followed. She is reinstated in her contractual rights and shall be entitled to complete the probation period in some new assignment. If she cannot go back to work the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons.

In any event she is entitled to 10,000 Swiss francs in damages for moral injury and, since she succeeds, to 4,000 francs in costs."

2. The Director of Administration of CERN thereupon reinstated her so that she might "finish probation". He explained that she was entitled to do so on some new assignment but that the Administration could not identify any until she had undergone medical examination. Actually she never went back to work at CERN and it is common ground, for all the procedural issues that arose over the enquiries by medical experts, that she was unable to do so. CERN took three sets of decisions, and they must be distinguished if the material issues are to be properly grasped.

3. First, since she had asked that her illness be treated as service-incurred, the Leader of the Personnel Division informed her by a letter of 1 November 1993 that the Director-General had decided, on the strength of the findings by the expert appointed to consider that request, that her illness was not service-incurred. After consultation of the Joint Advisory Rehabilitation and Disability Board the Director of Administration confirmed that decision on 15 March 1994.

4. Secondly, the Director decided on 19 July 1993 to extend her fixed-term appointment, which was to run out on 3 March 1994, by three months to let her finish probation and have the findings of the medical enquiry then underway. On 24 November 1993 he told her that her appointment could not be extended or renewed and so would expire at the scheduled date, 3 June 1994.

5. Thirdly, her case was put to the Disability Board on 22 June 1993 under Staff Regulation R II 4.16. That provision empowers the Director-General to decide after consulting the Board whether to "retain" a staff member - like the complainant - who had had 24 months' sick leave in 36 months. The Board at first said that it had no objection to her staying on pending the findings of the medical enquiry; then, on 17 February 1994, it recommended against the Director-General's renewing her appointment on the grounds that she would not be fit to go back to work before her contract expired. On the strength of that recommendation the Director of Administration told her on 15 March 1994 that she would not be kept on after 3 June 1994.

6. She is objecting both to the decision of 24 November 1993 and to the one of 15 March 1994 though she doubts that the latter is really a decision and says she is impugning it ex abundante cautela. The submissions being common, the Tribunal will join the two complaints.

7. The complainant contends that, whichever decision is impugned, the refusal to renew her appointment is at odds with what the Tribunal ruled in Judgment 1212 and that it shows a mistake of law and several procedural flaws.

8. Her first plea, then, is that there was breach of res judicata on the grounds that CERN refused renewal before completing the procedure to determine whether her illness was service-incurred and that the reason it gave for ending her contract was not the one the Tribunal mentioned. Her arguments fail for the following reasons.

9. Judgment 1212, on which she relies, restored her contractual rights by quashing the unlawful dismissal. But it did not confer on her any rights beyond those she derived from her contract. Since the contract was for a fixed term CERN had no duty either to convert it into a permanent one or to extend it until she was fit to go back to work. The judgment said she was entitled to finish probation on a new assignment, and CERN's obvious intention in extending her appointment to 3 June 1994 was to let her have one last opportunity of finishing her probation, which should have been for six months but which her illness had interrupted on 26 April 1991. It thereby discharged its obligation to let her finish probation.

10. The judgment said that if she could not go back to work "the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons", and on the strength of that she argues that when the decision of 24 November 1993 was taken the procedure for determining the "nature" of her illness was not yet over. It is true that CERN had decided as early as 1 November 1993 that her illness was not service-incurred, she had challenged its decision, and the Organization did not confirm it until 15 March 1994. But CERN did not preclude the possibility of keeping her on: as was said in 5 above, it referred her case to the Disability Board under Regulation R II 4.16. And it was on 15 March 1994, the very day that it decided not to treat her illness as service-incurred, that the Director of Administration refused to extend her appointment beyond the date of expiry. So her plea on that score cannot be sustained. Nor was CERN wrong to decline to dismiss her on grounds of incapacity. That particular outcome, which Judgment 1212 contemplated, was possible only while she was under contract. Once her appointment had expired dismissal was out of the question, and of course Judgment 1212 did not require CERN to keep her on after expiry of the appointment so that it might dismiss her.

11. The second strand to her plea about res judicata is that CERN gave a reason for termination other than the one the Tribunal had mentioned. There is no denying that the decision in the letter of 24 November 1993 did refer to her shortcomings in the Director-General's secretariat, as reflected in an appraisal report of 28 June 1991. But that reference must not be taken out of its proper context, which was to substantiate the impugned decision. In the third paragraph of the letter the Director of Administration said:

"Since you have not worked at CERN since 26 April 1991 we have been unable to reassess your performance. It seems from Professor Raix's conclusions, which were notified to you on 1 November 1993, that you are not well enough to consider any early return to work on a new assignment to finish probation."

Such reasoning is quite plain. It makes a connection between the fact that CERN could not reassess her work and the fact that she was unfit to go back and finish the probation she had hardly begun. So it was not the appraisal made in 1991 that prompted the non-renewal but, as CERN says, the lack of up-to-date assessment of her performance and the fact that there was no real prospect of her being fit to go back. Those were lawful reasons for the decision of 24 November 1993 and they are not inconsistent with Judgment 1212.

12. Besides not offending against res judicata, the decisions the complainant challenges show no breach of precedent or of any general principle of the international civil service that would amount to a mistake of law. Her argument is that an international official who is unfit for work may be dismissed only for reasons of health. But that is beside the point because hers is not a case of dismissal. What happened was that, as was recounted above, CERN refused to renew her appointment and the effect of that decision was to let her have a "100 per cent pension for unsuitability" as from 4 June 1994 and the continuance of social insurance coverage even though she was not entitled to the higher pension for incapacity.

13. For the reasons given in 11 the complainant is wrong to say that non-renewal was due solely to the appraisal made in 1991. So the Tribunal rejects both her plea that the reason CERN gave for its decision was unlawful and her contention - which is not proven anyway - that the appraisal of her showed flaws.

14. Her allegations about breach of due process fail too. She argues that the decision of 24 November 1993, the "only real final decision she may challenge", is unlawful because it was taken before the Disability Board had reported, and that was in breach of Regulation R II 4.16. But that Regulation applies only to the procedure for deciding whether to "retain" someone, not to a case of non-renewal. CERN followed the procedure concurrently, and that accounts for the decision of 15 March 1994, but it does not have to be applied until the competent authority decides whether or not to renew the fixed-term appointment.

15. By the same token the complainant is mistaken in contending that the rules on non-renewal, including the requirement in Regulation R II 6.02 of six months' notice, apply to the procedure for deciding whether to "retain" someone. There being no need to take up the issue of receivability on this point, her procedural challenge to the quashing of the decision of 15 March 1994 must therefore fail. CERN was under a duty to complete the procedure which it had itself begun, and which might have led it to keep her on, if it so wished, after consulting the Disability Board. There was nothing improper about its decision of 15 March 1994. Though she was doubtless hard pressed, and the case was an awkward one for the Organization, the action it took may be deemed to have brought the dispute to an end as fairly as possible.

16. The conclusion is that her claim to the quashing of the impugned decision must fail, and so in consequence must her claims to damages.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner