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

TWENTY-SIXTH ORDINARY SESSION

In re MIELE

Judgment No. 173

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Organisation for Nuclear Research (CERN) drawn up by Mr. Amato Miele on 10 July 1968 and brought into conformity with the Rules of Court on 20 August 1968, the Organisation's reply of 5 December 1968, the complainant's rejoinder of 15 June 1969 and the Organisation's surrejoinder of 14 July 1969;

Considering Judgment No. 141 dated 3 November 1969 whereby the Tribunal decided in an interlocutory order:

"1. An examination shall be carried out by two medical experts so as to:

(a) determine the present degree of Mr. Miele's invalidity and assess the degree of his present work disability with regard both to his former employment and to other kinds of possible employment;

(b) determine the extent to which the invalidity thus assessed may be regarded as the direct consequence of the accident suffered by the complainant on 14 July 1960;

(c) if necessary, determine the extent to which that invalidity may be regarded as the indirect consequence of the accident; and

(d) determine the nature of the disorders identifiable as the indirect consequence of the accident, and state the extent to which those disorders may be regarded as having a constitutional cause or as being attributable to factors independent of the accident, whether arising before or after it.

2. The experts shall be appointed by order of the Vice-President of the Tribunal, who shall determine the procedure for the examination and in particular, after consulting the parties, determine the final text of the questions to be put to the experts.

3. The experts shall draw up their report after consulting the dossier of the case and examining Mr. Miele. If they think fit, they may obtain the assistance on particular points and on their own responsibility of one or more specialists.

4. The Organisation shall advance the costs of the expert examination and Mr. Miele's expenses in submitting himself for the examination. The amount of these advances shall be determined by order of the Vice-President of the Tribunal.";

Considering the order of 18 February 1970 appointing Professor Marco Mumenthaler and Professor Hans Markwalder, specialists in neurology and neurosurgery of the University of Berne, as the experts who should carry out the examination ordered by the Tribunal in Judgment No. 141, the report of the experts dated 9 September 1970, the defendant Organisation's observations dated 14 October 1970 and those made by the complainant on 20 January 1971 in the light of the report.

CONSIDERATIONS:

As to receivability:

1. The Organisation has accepted the jurisdiction of the Tribunal in accordance with Article II, paragraph 5, of its Statute. Under that provision, the Tribunal is competent to hear complaints alleging the non-observance of the terms of appointment of officials of the Organisation or the infringement of its staff regulations. The present

complaint concerns the rate of disability pension payable under the Regulations of the Staff Insurance Scheme of the European Organisation for Nuclear Research, which were issued on the basis of the CERN Staff Regulations and Rules and are regarded as forming part of them. The Tribunal is therefore competent to hear the complainant's claims. It is immaterial that, unlike the 1967 Regulations of the Staff Insurance Scheme, those of 1959 and 1962 make no express provision for appeals to the Tribunal. Whatever the material legal texts in the light of which the complaint should be examined, the Tribunal's competence derives from its own Statute.

According to Article II, paragraph 6, of the Statute of the Tribunal, the Tribunal shall be open only (a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death; (b) to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely. It follows that an organisation may not submit a complaint to the Tribunal nor, consequently, claims for the modification of the impugned decision to the prejudice of the complainant. If it does not accept an official's complaint the only course open to it is to propose that it be dismissed in whole or in part. Consequently, the Organisation's claims in the present case are irreceivable to the extent that they relate to the reduction of the complainant's pension.

As to the experts' findings:

2. The experts appointed by the Tribunal found that the complainant is suffering from a "motor hemisyndrome on the right side which is not organic in origin" and which is due mainly to extraordinarily persistent and skilful simulation. While describing the simulation as conscious, or at least mainly so, they consider it unnecessary to decide whether it may become unconscious, since this is immaterial to the question of insurance. They therefore find that, although the complainant is now completely disabled, his condition, at least since July 1962, is neither a direct nor an indirect consequence of his accident.

In the present case the Tribunal can only base its judgment upon the experts' findings, which it has no reason to question. As the parties themselves admit, the experts discharged their responsibilities admirably. Their thorough analysis testifies both to their conscientiousness and to the depth of their scientific knowledge. There is nothing to suggest that their findings are incorrect or incomplete; in particular, to describe the accident of 14 July 1960 as "commonplace in itself" is in no way to under-estimate it, since a mechanic like the complainant can normally be expected to lift a heavy object. Moreover, since the examination was ordered by the Tribunal because of the disagreement among the many physicians who had previously examined the complainant, it is not surprising that the experts should differ from some of their colleagues. As for the possibility that the complainant's conscious behaviour might have become unconscious at some time, it appears from the following section that this question is immaterial to the present case, and the experts were therefore entitled to refrain from deciding it.

As to the complainant's right to a disability pension:

3. Having accepted the Organisation's offer of appointment on 14 May 1959, the complainant remained in its service until 30 June 1963. Accordingly, in deciding upon his claim it is necessary to examine the provisions in force during the period of his employment, i.e. either the 1959 Regulations of the Staff Insurance Scheme or those of 1962.

There is no need to decide which of these texts applies. According to article 24 (1), subject to a condition the difference in whose wording is irrelevant to the present case, both texts provide for payment of a disability pension to any Scheme member who, according to the findings of a medical practitioner selected by the Management Board, is deemed incapable of carrying out his duties. Admittedly, whereas the 1959 Regulations make no express provision for the official who is the victim of an accident in the course of duty, under article 23 (4) of the 1962 Regulations such an official and his wife and children are entitled to full benefits. Article 26 (4) of both texts provides, however, that if the disability is obviously due, in the opinion of the Management Board, to the member's own fault, the pension may be reduced or cancelled. Since the existence of fault appears from what is said below, the complainant's claims must be dismissed on the basis of both the 1959 and the 1962 Regulations.

According to the experts, the complainant is consciously simulating his disability, at least for the most part. Such simulation constitutes fault within the meaning of article 26 (4) of both texts since conscious simulation constitutes fraud, the highest degree of fault. It is immaterial whether or not the complainant's conscious behaviour has become unconscious; even if the simulation is at present to some extent involuntary it results from a voluntary form of deception, i.e. fault. Moreover, it is pointless to consider whether up to July 1962 the complainant's

disability was entirely his own fault: from the date of the accident until 30 June 1963 the complainant received his salary in full and he is not entitled to payment of a pension for that period.

As appears from the first section of this judgment, the Tribunal cannot reduce the benefits granted to the complainant in accordance with the impugned decision, namely a pension equivalent to 20 per cent of his average insured earnings plus a lump sum representing the actuarial value of a 10 per cent pension. Accordingly, and without there being any need to examine whether the fault attributable to the complainant would in itself have warranted the cancellation of the pension awarded, it is sufficient to find that in any case, in view of the experts' report, the reduction made under the impugned decision is in no way excessive.

The complainant cannot properly contend that by virtue of article 21 of the agreement which the Organisation has concluded with the Swiss Federal Council the former is bound to ensure "so far as possible and subject to conditions to be agreed upon, the affiliation to Swiss insurance schemes of staff members who are not covered by equivalent social protection by the Organisation itself". Had it been committed to paying its officials benefits equal to those provided for in Swiss law, the Organisation would not have failed in that obligation in the present case. Neither under public nor private insurance schemes does Swiss law entitle a person guilty of conscious simulation to more favourable treatment than that which the complainant has received.

DECISION:

For the above reasons,

1. The Organisation's claims are irreceivable to the extent that they relate to reduction of the pension granted to the complainant under the impugned decision.

2. The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 May 1971.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

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