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

EIGHTY-EIGHTH SESSION

In re Blazianu

Judgment 1901

The Administrative Tribunal,

Considering the complaint filed by Mr Nicolas Jean-Charles Blazianu against the European Organization for Nuclear Research (CERN) on 22 December 1998 and corrected on 10 February 1999, CERN's reply of 20 May, the complainant's rejoinder of 26 July and the Organization's surrejoinder of 29 September 1999;

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. The complainant, a Frenchman who was born in 1942, joined CERN on 1 September 1968 as a technician/operator at grade 5. He was promoted several times and in 1995 was on grade 9.

By a decision of 17 June 1985 the district court of Bourg-en-Bresse (France) pronounced his divorce from his wife, also a CERN staff member, and gave custody of their two children to the mother. For the children's maintenance, it ordered the complainant to pay alimony to his former wife and to make over to her the family allowances paid to him by CERN. On 28 October 1985 the former spouses signed an agreement whereby the family allowances were to be deducted from the amount of the alimony.

On several occasions - in particular in May 1990, March 1991, May 1991 and October 1993 - the complainant assaulted or seriously threatened his former wife. As a result of his conduct CERN gave him numerous warnings, sometimes with sanctions, and the French authorities arrested him on 17 May 1991 (he was released under judicial supervision on 24 June 1991) and gave him an eight-month suspended prison sentence in June 1994. He also underwent a medical examination in 1991 at CERN's request.

By a decision of 21 December 1993 the Court of Appeal in Lyon adjusted the amount of alimony set in the divorce decree, and reversed the agreement to deduct the family allowances from the amount of the alimony. The complainant disregarded that decision and continued to deduct the allowances. By a letter of 8 August 1994 the Director of Administration of CERN informed him that the Finance Division would withhold from his pay an amount set in a distraint order issued by the Receivers' Office of the Canton of Geneva and that the family allowances would be paid directly to his former wife pursuant to the decision of the Court of Appeal and in accordance with Staff Regulation R IV 1.17.

On Monday 13 February 1995 the complainant informed his supervisors by telephone that during the weekend he had dismantled and removed a large number of components of the Proton Synchrotron accelerator. He said that he would return the stolen equipment if CERN dismissed his former wife and paid him 2 million francs. The Organization reported the matter to the French police. The complainant was arrested on the evening of 13 February and placed in custody.

On 23 February the Director of Administration told the complainant that in view of the gravity of the act and its serious consequences for the Organization, he was to be dismissed without notice. He was given eight days to explain his actions. By a letter of 28 February 1995 the complainant asked the Director of Administration for more time. The Organization having agreed to his request, the complainant wrote a letter to the Director of Administration on 1 March 1995, in which he admitted to his wrongdoing and attributed it to the suffering caused by the dispute with his former wife and the Organization's attitude to the matter. By a letter of 16 March the Director-General told him that nothing he had said in his letter of 1

March could excuse the misdeed and that he would be dismissed for "seriously harmful" acts and "unspeakable behaviour" as from 31 March 1995. By a letter of 29 May the complainant informed the Director-General that he would not appeal against the decision to dismiss him for serious misconduct and that he accepted the nature and gravity of the sanction.

By an order of 14 June 1995 the Bourg-en-Bresse district court released the complainant on the strength of a report drawn up by a forensic psychiatrist, dated 22 May, which concluded that at the material time the complainant had been suffering from a "mental disorder depriving him of his power of judgment". At the same time the complainant was committed to a psychiatric hospital. On 24 July the court ruled that the case would not proceed to judgment because the complainant was not criminally responsible for his acts.

Relying on that decision, on 10 November the complainant asked to be reinstated with retroactive effect. On 28 November 1995 the Director of Administration replied that the decision of the French court had no bearing on the measure taken by CERN. By a letter of 12 January 1996 to the Director-General, the complainant said that as a result of the court's ruling and the conclusion it drew about his state of health the Organization should review the reasons it gave for his dismissal. In a letter of 2 February he asked for an "invalidity" pension, and reiterated that he was not contesting his dismissal. By a letter of 11 October 1996 the Administrator of the CERN Pension Fund informed him that he was entitled to a deferred retirement pension and may at any time apply for an anticipated retirement pension. By a letter of 16 March 1998 the complainant asked the Administrator to recognise his entitlement to an incapacity pension or failing that to a pension for unsuitability. Articles II 3.01, II 3.02, II 4.01, II 4.02 and II 4.04 of the Rules of the Pension Fund read as follows:

"Article II 3.01: Definition

The term 'incapacity' covers the case where a member becomes totally or partially incapable of performing his duties on account of a consolidated illness or accident.

Article II 3.02: Entitlement to Total Incapacity Pension

A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension.

Article II 4.01:Definition

Unsuitability is the reduction, presumed to be permanent or long-term, by at least 1/3 in earning capacity resulting from a deterioration in physical or mental health, which occurred while the person concerned held a contract with one of the participating Organizations.

Article II 4.02: Establishment of Unsuitability

Unsuitability or the likelihood of unsuitability shall be established not later than at the medical examination required by the Staff Rules and Regulations on termination of service.

Article II 4.04: Entitlement to Pension for Unsuitability

Subject to the provisions of Articles II 4.01 and II 4.02, a member shall be entitled to a pension for unsuitability upon leaving the employing Organization for a reason other than resignation or dismissal owing to a disability confirmed by a medical certificate, or upon the occurrence of unsuitability the likelihood of which had been established in accordance with the provisions of Article II 4.02."

By a letter of 15 June 1998 the Administrator of the Pension Fund replied that, according to Article II 3.02 of the Rules of the Pension Fund, he did not qualify for an incapacity pension because he had not been dismissed on grounds of medically confirmed incapacity.

On 6 July 1998 the complainant lodged an appeal with the Chairman of the Governing Board of the Fund against the decision of 15 June. He submitted that psychiatric reports since 1991 showed him to be unfit for work and that the Organization should have dismissed him in 1995 on grounds of medically confirmed incapacity. The Chairman replied in a letter of 30 September 1998 that since he had not been dismissed for medically confirmed incapacity and did not qualify under the Rules of the Fund for either an incapacity or an unsuitability pension, it was pointless to start appeal proceedings. He, therefore, allowed him to come directly to the Tribunal.

B. The complainant contends that he is entitled to an incapacity pension because he can no longer fully

perform his duties owing to an illness that he had at the time of his dismissal or even before.

He rebuts the Fund's argument that he is barred from such a pension because the reason stated in the letter of dismissal was serious misconduct and not medically confirmed incapacity. In his view, what grounds the letter gave is of little import. What matters is whether there is a sufficient causal link between the grounds given and medically confirmed incapacity. Nor does it matter if the incapacity was confirmed later, provided that it existed at the time of his dismissal and was the real cause of it.

He points out that medical reports since 1991 have established that he suffered from a mental disorder that could lead to behaviour incompatible with his duties. The medical experts who examined him in May 1995, barely three months after the events that prompted his dismissal, are categorical: he committed the act of sabotage in a moment of madness. Consequently, medically confirmed incapacity was clearly at the origin of the act that prompted his dismissal. A causal link between the dismissal and the incapacity has therefore been established.

In subsidiary pleas the complainant contends that he is entitled to a pension for unsuitability. His unsuitability should have been established at the latest in the medical examination that staff members must undergo upon separation. But CERN ordered no such examination in his case. It is a breach of good faith to deprive him of such a pension when it is still possible to establish that the medical examination would have shown conclusively that his earning capacity was reduced by one-third.

He asks the Tribunal to quash the Pension Fund's decision of 15 June 1998 and the decision of 30 September 1998 of the Chairman of the Governing Board of the Fund, to declare that he is entitled to an incapacity pension or failing that to a pension for unsuitability with effect from 13 February 1996, and to send the case back to the Pension Fund to determine the amount of the incapacity or unsuitability pension.

C. In its reply CERN contends that the complainant does not qualify for an incapacity pension because he was dismissed not for medically certified incapacity but for exceptionally serious misconduct. It submits that he is not challenging the lawfulness of the Administrator's decision or its consistency with the Pension Fund rules, but is attempting to challenge the decision of 16 March 1995 to dismiss him. But that decision may not be challenged in the context of this procedure. The complaint is therefore unfounded.

In subsidiary pleas CERN submits that the complaint would have been unfounded even if it had challenged - within the time limits - the decision dismissing him, because the conditions for dismissal on grounds of medically confirmed incapacity were not met. His supervisors had always found his performance satisfactory. Neither CERN's medical officers nor his own doctors found any general limitation of his capacity to work. The expert that CERN appointed to examine him in 1991 concluded that he was fit to work and that his problems were not medical in nature.

The French court's decision not to judge his case following the sabotage in February 1995 does not alter that assessment. In his report the forensic psychiatrist said that at the time of sabotage the complainant was suffering from a mental disorder that deprived him of judgment, but he only concluded that the complainant was not criminally responsible. However, an act committed when he was momentarily in the grip of a mental disorder that made him non-liable under penal law cannot be assimilated to, nor does it presuppose, a general incapacity to work. Nor can it be concluded from the later medical certificates, three years after the event, that the complainant was totally incapable of performing his duties at the time of his dismissal in 1995.

CERN points out that, according to the rules, dismissal for medically confirmed incapacity involves a clearly defined procedure before the Joint Advisory Rehabilitation and Disability Board. In the complainant's case the requirements for opening such a procedure were not met.

Furthermore, since when he left the Organization no reduction in his earning capacity had been noted, he does not qualify for a pension for unsuitability either. As to his objection that CERN failed to order a medical examination upon his departure from service, it was unable to do so because he was imprisoned immediately after the sabotage.

Lastly, the Organization points out that it paid the complainant unemployment benefit from 1 April 1995 to

24 May 1996 and he may at any time apply for an anticipated retirement pension.

D. In his rejoinder the complainant acknowledges that he was dismissed for serious misconduct and not medically certified incapacity, but asserts that he asked CERN several times to review those grounds on the strength of new facts unknown at the time: the behaviour that prompted his dismissal arose from a medical incapacity due to psychiatric reasons. He submits that a request for such a review is a fundamental right and is subject to no time limit. He asserts that the Pension Fund is part of the legal structure of CERN and has no independent legal status. Consequently, his request to the Fund should be treated as a request to CERN. He submitted it for the first time in his letter of 16 March 1998 in which he asked the Organization to convene a meeting of the Joint Advisory Rehabilitation and Disability Board to rule on the validity of his request; "this letter should [in his submission] have been forwarded to the Director-General of CERN, in view of its purpose and its claims".

He contends that it would be plain to any psychiatrist that, in view of the manner in which the sabotage of February 1995 was committed, it cannot be ruled out that it was the act of "a madman deprived of all power of judgment". In his submission the issue is not whether the Organization should have anticipated a deterioration in his health, but whether "objectively" in February 1995 his mental state was such that it warranted dismissal on grounds of medically confirmed incapacity.

The complainant submits new claims. He asks the Tribunal to quash the decision of 16 March 1995 to dismiss him in so far as it is based on exceptionally serious misconduct and to state that the reason for the dismissal was medically confirmed incapacity. As a subsidiary claim he asks the Tribunal: to order a medical assessment of his state of health to establish whether, in February 1995 and at the date of his dismissal, he was incapable of performing his duties owing to illness; or to order that the Joint Advisory Rehabilitation and Disability Board rule on the matter.

E. In its surrejoinder CERN submits that, since he is unable to produce any convincing arguments, the complainant is attempting to pass off his claim of 16 March 1998 to an incapacity or an unsuitability pension as a claim to a review of CERN's decision of 16 March 1995 to dismiss him. According to him, the claim has not been submitted before and should, therefore, be treated as receivable. But his argument is contrived and indefensible both in fact and in law.

First, the letter of 16 March 1998 was addressed to the Pension Fund and does not, therefore, constitute a request to the Director-General for a decision, under Rule VI 1.02 of the CERN Staff Rules. The fact that the Pension Fund has no separate legal personality from the Organization is immaterial in this context and certainly affords no grounds for concluding that a letter sent to the Fund should also be treated as a request to the Director-General for a new decision.

Secondly, in terms of its content the letter does not seek a review of the decision dismissing the complainant, but makes a

> **"formal request for recognition of [an] entitlement to an incapacity pension, or failing that a pension for unsuitability within the meaning of the Rules and Regulations of the CERN Pension Fund and to payment of a total incapacity pension, or failing that a pension for unsuitability."**

Even if the letter of 16 March 1998 had sought a review of the decision to dismiss him and had been addressed to the Director-General, the present complaint would be irreceivable. In that hypothesis CERN's refusal would merely be a confirmation of an earlier decision, since the complainant had already sought a review of the decision dismissing him on the strength of the ruling handed down by the Bourg-en-Bresse district court. The Organization rejected that request in its letter of 28 November 1995. Having failed to challenge that rejection within the prescribed time limit, the complainant may not now challenge it by submitting a new claim. Besides, he formally undertook in his letter of 29 May 1995 not to contest his dismissal.

CONSIDERATIONS

1. The complainant joined CERN on 1 September 1968. He was dismissed on 16 March 1995 for exceptionally serious misconduct, without compensation or notice, with effect from 31 March 1995. As from 1990 he had numerous disputes with his former wife, also a staff member of CERN, some of which earned

him disciplinary sanctions or penal sentences. Events came to a head in February 1995 when he dismantled and removed a large number of components of the Proton Synchrotron accelerator and informed his supervisors that he would return the stolen equipment if the Organization dismissed his former wife and paid him 2 million francs. The French police arrested him on 13 February 1995. He was released under judicial supervision on 14 June and committed to a psychiatric hospital. The French court ruled on 24 July that the case would not proceed to judgment, the examining magistrate having found him "not criminally responsible for the acts of which he [was] accused". Citing that ruling, on 10 November 1995 the complainant asked to be reinstated retroactively in his former job, but CERN replied on 20 November 1995 that "the decision of the French criminal court ... [had] no bearing on the measure taken by CERN". Though dissatisfied with the response, the complainant did not formally contest it. In a letter of 2 February 1996 he stated that he did "not intend to challenge the decision to dismiss [him]", but was applying for an "invalidity" pension. In October 1996 the Administrator of the CERN Pension Fund told him that he was entitled to a deferred retirement pension under Article II 2.03 of the Rules of the Fund.

2. By a letter of 16 March 1998 to the Administrator the complainant submitted a formal claim to an incapacity pension or, failing that, a pension for unsuitability. The Administrator rejected his claim on 15 June 1998 on the grounds that he had not been dismissed for medically certified incapacity. The complainant appealed against that decision to the Governing Board of the Fund, but on 30 September 1998 the Chairman of the Board upheld the decision and allowed the complainant to go directly to the Tribunal in accordance with the Fund's Regulations for appeals.

3. In his complaint to the Tribunal the complainant seeks the quashing of the decisions of 15 June and 30 September 1998 and recognition of his entitlement to an incapacity pension or failing that to a pension for unsuitability. In his rejoinder he enlarges on his claims, seeking the quashing of the decision of 16 March 1995 to dismiss him in so far as it was based on exceptionally serious misconduct. He also asks the Tribunal to declare that he was dismissed on grounds of medically confirmed incapacity or, failing that, to order a medical evaluation or the convening of the Joint Advisory Rehabilitation and Disability Board.

4. In so far as the complainant is now challenging the decision of 16 March 1995, those claims are obviously irreceivable. They were never submitted in the internal proceedings and, moreover, they are inconsistent with his affirmation dated 29 May 1995 that he would not challenge the decision to dismiss him. The decision of 16 March 1995 has become definitive in its entirety and the complainant may not submit an initial claim to its quashing in a brief filed on 26 July 1999 in the context of a dispute with the Pension Fund.

5. The complainant is attempting to avoid the time bar by submitting that he is challenging the Organization's rejection of his request of 16 March 1998 which was to be construed as a request to have his position reviewed in the light of new elements. But apart from the fact that the request for a review of the grounds for his dismissal was not clearly worded and was addressed to the Administrator of the Pension Fund, who was not competent to rule on the matter, it contained no element that might lead the Organization to reconsider a decision it had taken three years earlier and which had become final.

6. In order to determine the complainant's entitlements to an incapacity pension or a pension for unsuitability, it is necessary to refer to the material provisions of the Pension Fund Rules.

7. Article II 3.02 of the Rules says "A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension". As noted above, the complainant was dismissed for misconduct and not for medical incapacity. Having failed to appeal properly against the decision dismissing him, it is no longer open to him to challenge before the Pension Fund the reasons for dismissal and allege that he was dismissed on grounds of a mental disorder (see Judgment 1665 *in re* Palma).

8. As to his subsidiary claim to a pension for unsuitability, the material rules are those cited above under A. The complainant asserts, not altogether wrongly, that he did not undergo a medical examination on termination of service and that he asked several times to have his entitlement to an "invalidity pension" recognised. The defendant argues that it could not arrange a medical examination for him at the time of his dismissal because he was in prison. It adds that it relied on a medical check-up that he had undergone on 18 January 1995, in which no such health problem was noted as to indicate a reduction in his earning capacity.

9. The Tribunal cannot accept that argument. Under Article R II 4.18 of the Staff Regulations, a medical

examination is compulsory when a contract is terminated, for whatever reason. In view of the particular circumstances of the case, CERN should have been at particular pains to comply with that rule. In the absence of such an examination the Pension Fund should have determined whether, upon termination of service, the complainant was to be treated as unfit for work because of a deterioration in his physical or mental health which occurred while he was employed by CERN. The Administrator of the Pension Fund was, therefore, wrong in June 1998 when he refused to consider the complainant's entitlement to a pension for unsuitability. The Tribunal can only send the case back to the Pension Fund (a) for it to determine, on the basis of all the medical evidence and a medical examination in accordance with Article II 4.02 of the Pension Fund Rules and, if appropriate, after consulting the Joint Advisory Rehabilitation and Disability Board, whether, at the date on which he left the Organization, the complainant qualified for an unsuitability pension, and (b) to come to a decision on the award of such a pension.

DECISION

For the above reasons,

1. The decision of 30 September 1998 of the Chairman of the Governing Board of the CERN Pension Fund is set aside in so far as it refuses to consider the complainant's entitlement to a pension for unsuitability.

2. The case is sent back to the CERN Pension Fund for it to consider the complainant's entitlement to a pension for unsuitability in accordance with 9 above.

3. The other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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