

SIXTY-FOURTH SESSION

***In re* MISCHUNG (No. 5)**

Judgment 889

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Norbert Mischung against the European Southern Observatory (ESO) on 28 August 1987 and corrected on 17 September, the ESO's reply of 28 October and the complainant's letter of 30 December 1987 to the Registrar of the Tribunal stating that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the ESO Staff Regulations and Chapter II, section 4, of the Rules and Regulations of the Pension Fund of the European Organization for Nuclear Research (CERN);

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The ESO participates in the staff insurance scheme, or Pension Fund, of CERN and its staff are members of the Fund and subject to its Rules and Regulations and to any amendment thereof. The Council of CERN amended the Fund rules on 18 December 1986 as from 1 January 1986. Section 4 of Chapter II provides for the award of a pension for "unsuitability", a term defined in II 4.01 as "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". II 4.02 says that unsuitability or the likelihood of it shall be established by the date of the medical examination on termination of service.

The ESO employed the complainant, a citizen of the Federal Republic of Germany, from 1 November 1981. Since he was to leave on 31 October 1986 he was given a check-up on 11 August 1986, and it was then that he first told the ESO's medical adviser, Dr. Münchhoff, that his disputes with the ESO had caused him "psychic damage". On 22 October he repeated in writing that he had "contracted a psychic illness during and in connection with my ESO service" which might impair his capacity for work and prove incurable; he reserved the right to claim compensation and said he was available for further examination. Dr. Münchhoff reported to the Personnel Office on 24 October 1986 that his allegation of service-incurred illness was not proven. The ESO referred his case to the CERN Fund which, on 19 February 1987, wrote to him asking for a certificate from a doctor of his own choosing that established a connection between his condition and his employment. On 29 March he sent the Fund an undated certificate signed by Professor Meyendorf of the Psychiatric Clinic of the University of Munich. In a letter of 25 May the Fund informed the ESO that, after consulting its own medical adviser, Dr. Steinmann, it was not satisfied that the complainant was suffering from any occupational illness, and the Head of Administration so informed him on 2 June 1987. A letter of 2 July in which he rejected the conclusion was passed on to the Fund. On 7 August the Head of Administration wrote to him again saying that the new Fund Rules and Regulations approved as from 1 January 1986 - of which the ESO had just become aware and which were appended - were applicable and his case had been reviewed against those rules; they required that the alleged illness be established by the date of final medical examination; the examination of 11 August 1986 had not revealed the condition he alleged; and in any event the certificate from Professor Meyendorf failed to establish that any degree of "unsuitability" within the meaning of Article II 4.01 of the Fund rules had been caused by his employment. That is the decision he impugns.

B. In the complainant's submission the certificate from Professor Meyendorf, whom he had been consulting since 1982, does establish that he is suffering from a chronic illness and that he contracted it while employed at the ESO. It is unfair to require him to comply with Article II 4.02 of the Fund Rules and Regulations that came into force as from 1 January 1986 when they were not passed on to him until 7 August 1987. The ESO failed to discharge its duty to inform him promptly of the new rules and wants him to bear the consequences of its own negligence. The Fund's finding that his illness was not service-incurred is mistaken. The Fund did not even have him examined and

failed to take proper account of his medical records, which make it plain that he was well until he joined the ESO. He invites the Tribunal to find that he contracted an illness "during and in connection with" his employment at the ESO and to award him compensation in the form of "adequate payment or payment of a pension" for as long as his service-incurred illness and "unsuitability" continue.

C. In its reply the ESO submits that, though competent to send the case back for a new decision, the Tribunal may not award compensation: if the complainant is suffering from a service-incurred illness his entitlements may be determined only by the Fund rules.

Besides, his claims are devoid of merit. It is the 1986 version of the Rules and Regulations that applies because he left the ESO on 31 October 1986. Since he failed to give evidence of the alleged illness at the time of his final check-up, even though Dr. Münchhoff asked him to provide it, his claims fail on a strict interpretation of Article II 4.02. Since he was not aware of the new rules until August 1987 the ESO admitted the certificate from Professor Meyendorf, but that certificate, too, fails to bear out his allegations. As the Fund's medical adviser found, the problem lies with his personality, not his employment. Moreover, the certificate describes his condition as "exceptional"; it is therefore presumably neither permanent nor likely to last long, as II 4.01 requires. The certificate does not say his earning capacity is impaired: in fact he took no sick leave and showed no sign of being unable to work. Lastly, since, as the certificate says, he was seeing Professor Meyendorf as early as October 1982, he was suffering from a condition that required medical attention even before his disputes arose with the ESO.

CONSIDERATIONS:

1. The purpose of this case is to determine whether the illness from which the complainant says he is suffering was attributable to his employment at the ESO.

The organisation's answer was in its letter to him of 2 June 1987, which merely said that the Pension Fund of the CERN - to which ESO staff belong under an agreement between the two organisations - had on 25 May 1987 refused his claim and declared his illness not to be service-incurred.

Amendments to the material rules of the Fund Rules came into force as from 1 January 1986 but - says the ESO - did not come to its notice until the summer of 1987. It then reviewed the complainant's claim but endorsed the view expressed by the Fund's medical adviser, Dr. Steinmann, on 22 May 1987 that it was not proven that the reduction in capacity he alleged under Fund rule II 4.01 had occurred while he was still under contract. The ESO accordingly took another decision on 7 August 1987 rejecting his claim.

Since the complainant is challenging that decision the burden is on him to prove service-incurred illness.

He contends that he did so in the internal appeal proceedings and thereby established his claim under the ESO Staff Regulations.

2. On 11 August 1986 the complainant had a compulsory end-of-service medical check-up. The ESO maintains that it did not reveal the alleged illness, but its plea fails. Dr. Münchhoff, the doctor the ESO appointed to carry out the check-up, reported on 24 October 1986 that, although the check-up and the medical records submitted by the complainant did not establish the existence of any service-incurred illness, he recommended further examination by specialists to remove doubt on the matter. Indeed before reaching its decision of 7 August 1987 the ESO took account of the further medical findings obtained at Dr Münchhoff's suggestion.

3. The certificate the complainant says showed the causal link between illness and employment was the undated one signed by Professor Meyendorf of the Psychiatric Clinic of the University of Munich. But that certificate and Dr. Steinmann's comments thereon suggest no breach of its rules by the ESO.

What Professor Meyendorf says is that he had been treating the complainant since 1982 - after he had joined the ESO - for "nervous exhaustion and insomnia". The certificate makes no connection between those symptoms and the complainant's work. It speaks of the disputes which he had with the ESO over the process he invented in 1984 and which the Tribunal ruled on in Judgments 840, 841 and 842 of 10 December 1987. It says that he has developed the symptoms of a neurotic condition since 1984 and shows increasing preoccupation with his disputes.

Although the disputes may indeed have made his condition worse, it is not established that that condition was directly attributable to his employment. The medical certificate speaks merely of an "alteration of personality". As

the ESO points out, it does not say outright whether the complainant's condition was due to his employment or to his own personality. Moreover, in his comments of 22 May 1987 Dr. Steinmann observes that the only reason why the disputes had the consequences Professor Meyendorf mentions was the complainant's unstable personality, which succumbed to pressure an emotionally balanced man would have withstood; the complainant's illness is not service-incurred.

The Tribunal has no reason not to endorse that view.

4. The complaint also fails under the new Fund Rules and Regulations which have been in force since 1 January 1986. The new rules have been applied to this case because they are more favourable than the old ones in that the right to a disability pension is no longer subject to the continuance of a contractual link between the staff member and the organisation.

The new text of II 4.01 reads: "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". Rule II 4.02 stipulates: "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".

5. The complainant did not satisfy the conditions in II 4.01. As the ESO points out - and there is no reason to doubt its good faith - the complainant showed no reduction in working capacity and never even applied for sick leave throughout the period when he was supposedly suffering from a service- incurred illness. The medical certificate by Professor Meyendorf finds no "reduction, presumed to be permanent or long-term, by at least 1/3 in earning capacity", which is what II 4.01 requires. On the contrary, as the ESO observes, the certificate treats the complainant's condition as "exceptional".

The conclusion is that the evidence the complainant himself produces fails to establish a service-incurred illness, and his complaint is therefore devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner