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

TWENTY-SECOND ORDINARY SESSION

In re MIELE

(Interlocutory Order)

Judgment No. 141

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the European Organization 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 reply of the Organization dated 5 December 1968, the memorandum of the complainant in rejoinder dated 15 June 1969 and the memorandum of the Organization in reply thereto dated 14 July 1969;

Considering article II, paragraphs 5 and 7 of the Statute of the Tribunal, article 13 (2) of the Regulations of the CERN Staff Insurance Scheme (1959, 1962 and 1967 editions), article 23 (3) and (4) of the same Regulations (1962 edition), and article H 1/5 of the Staff Rules and Regulations of the Organization;

Having examined the documents in the dossier, the oral proceedings requested by the parties having been disallowed;

Considering that the material facts of the case are as follows:

A. On 14 July 1960, Mr. Miele, who had been employed at CERN for over a year as a mechanic, dismantled the metal mandrel of a lathe. He lifted the mandrel, which was round and oily and weighed 40 kg., together with the unfinished piece attached to it towards a tool cupboard 1.10m. high about 3m. away from the lathe. As he was carrying it at chest level, it suddenly slipped from between his hands. Lurching to catch it and lift it into the tool cupboard, he felt a sharp pain in his back. After receiving attention at home he was admitted on 15 August 1960 to the Cantonal Hospital in Geneva, which diagnosed a sensorimotor hemisyndrome and a radicular syndrome on the right side (L 5) due to a central nervous lesion, probably an ischaemia in the vertebro-basilary system. The whole of his right side was affected, and he was also found to be suffering from serious impairment of vision in the right eye, dextral hypoacusis and deviation of the tongue. When he left hospital on 3 November 1960, despite marked improvement, the hospital doctors found him at that time completely disabled for work.

B. His contract of service, normally due to expire on 31 August 1960, was renewed and he continued to receive his salary in full. The Organization invited nim to resume part-time work and between August and November 1961 he performed light duties for half a day at a time with long intervals. Because of headaches and other pains, however, he soon had to abandon even this work, which took up only 30 per cent of his time. In February 1962 he underwent thorough exanimation by the Medical Adviser of the CERN Staff Insurance Scheme, who on 17 February 1962 confirmed the diagnosis of a sensorimotor hemisyndrome and found him disabled for work to the extent of 100 per cent, and also suffering from 100 per cent invalidity.

C. Anticipating that a disability pension would be payable to Mr. Miele, the CERN; Staff Insurance Scheme informed La Suisse, an accident insurance company with which it is reinsured. At the company's request Mr. Miele underwent thorough medical examination from 28 May to 9 June 1962 at the Neurosurgery Department of the Cantonal Hospital in Lausanne, which was informed of the results of the many earlier examinations. According to the resulting report, dated 19 July 1962, by Dr. Zander his physical condition no longer showed serious defects and a link of causation between some of the affections observed and the accident could not be established. Moreover, his frequent attempts at simulation during the examination - whether conscious or unconscious - showed the presence of a "serious additional psychogenic factor involving refuge in illness". The specialists recommended the grant of a disability pension of 20 per cent. On his return to Geneva Mr. Miele had himself re-examined by two specialists (Professor Franceschetti and Dr. Russbach) and by Dr. Musso, Medical Adviser of the CERN, Staff Insurance Scheme. Taking into account his colleagues' findings, Dr. Musso considered that, while Mr. Miele was certainly suffering from sinistrosis to some extent, the anatomical lesions alone prevented him from resuming

work. Since he had previously been performing skilled manual work, the specialists considered him to be suffering from 100 per cent disability.

D. On 27 March 1963 the head of personnel at CERN informed the complainant that the Organization felt bound to terminate his employment on 31 May 1963 for health reasons under provision H 1/5 of the Staff Rules and Regulations. The date was later postponed to 30 June 1963. On 2 July 1963 the complainant was provisionally granted a full disability pension (100 per cent) of 578 Sw. Frs. a month (less 66 Sw. Frs. as his contribution to the CERN Staff Insurance Scheme, or 512 Sw. Frs. net), pending a final decision by the Management Board of the Scheme on the extent of his disability. It had hitherto been prevented from deciding by the contradictory medical findings. The complainant was accordingly re-examined by a specialist in Bern, Dr. Bärtschi-Rochaix, who, in a report dated 26 August 1963, diagnosed sequelae of a sacrolumbar disc lesion and sciatica on the right side and an independent psycho-pathological condition with aggravating effects. He ruled out any link of causation between certain other symptoms and the accident and postulated incipient degeneration. In his view affections not attributable to the accident were influencing the clinical findings to the extent of 90 per cent, the organic effects to the extent of only 10 per cent. He recommended psychiatric treatment followed by readaptation and found permanent disability attributable to the original injury to the extent of 10 per cent. After full review of the facts and medical reports, the Medical Adviser of the Scheme concluded in his final report to the Management Board that the accident had undoubtedly caused sensorimotor disorders and led to a "neurosis of fear and anxiety". He assumed the presence of iatrogenic symptoms due to the many examinations undergone by the complainant. He recommended CERN to accept some responsibility for the neurosis since Mr. Miele had been admitted without limitations by the Scheme on joining CERN. He added: "In my view Mr. Miele's work capacity is at present 20 per cent. The accident alone led to permanent partial disability attributable to the extent of 20 per cent to the anatomical lesions and to the extent of 10 per cent to the subsequent psychological and nervous disorders arising exclusively out of the accident itself. Thus the extent of partial disability attributable to the accident amounts to 30 per cent." He accordingly recommended the grant of a 30 per cent pension or its lump sum equivalent. Following this report, at a meeting held on 20 November 1963 and attended by the Medical Adviser, the Management Board of the Scheme considered the results of the examination in Bern and the Medical Adviser's findings. Setting the extent of permanent partial disability at 20 per cent, it decided to pay the complainant the corresponding pension and, in order to help with his readaptation, a lump sum representing the actuarial value of a 10 per cent disability pension. The Scheme would continue to bear his medical expenses. He was informed of this decision by letter of 26 December 1963. The pension was thus reduced to 20 per cent, or 115.60 Sw. Frs. a month (less 66 Sw. Fr. as contribution to the Scheme, or 49.60 Sw. Fr. net).

E. Mr. Miele then had himself examined by an Italian specialist who, in a report dated 28 January 1964, described as absolutely absurd the finding of a sensorimotor syndrome on the right side and the suggestion of incipient degeneration. In his view some of the simulations detected in earlier examinations were anatomically impossible, and "although the patient was led by perfectly understandable and justifiable human motives to exaggerate and perhaps even to simulate his symptoms, the existence of a post-traumatic neurological syndrome causing 100 per cent work disability - inasmuch as the patient needs constant medical assistance and care - is clinically beyond dispute". On 1 February 1964 Mr. Miele wrote to the Management Board of the Staff Insurance Scheme to protest at the charges of simulation in the examination report on which it had based its decision. He also sent it the Italian specialist's report and requested arbitration in accordance with the Scheme Regulations. On 11 March 1964 the Board informed him that his case would be submitted to arbitration in accordance with article 13 (2) of the Regulations; in the meantime its decision stood, and he would receive a 20 per cent pension amounting to 49.60 Sw. Fr. a month, after deduction of the insurance premiums payable to the Scheme. The sum rose to 80.60 Sw. Fr. a month in January 1966 on a reduction in the premiums. The doctors appointed by the arbitrators reported on 12 June 1967. Having studied all the medical findings in the case, but without examining the patient themselves, they determined the extent of permanent disability due to the accident to be 20 per cent. On 10 May 1968 the arbitrators made their award, which is the decision contested by the complainant. Under this award, in which no grounds are given, the payment of a pension amounting to 20 per cent of the average insured salary and of a lump sum representing the actuarial value of a 10 per cent pension was confirmed.

F. In his complaint dated 10 July 1968 Mr. Miele requests the Tribunal to quash the arbitrators' decision of 10 May 1968, to find that he is suffering from permanent invalidity consequent upon the accident and causing total work disability, and to order the defendant organisation to grant him the corresponding disability benefits. In support of these claims he refers to the findings of his own doctors and to the report of 17 February 1962 of the Medical Adviser of the Scheme, who found him to be suffering from 100 per cent work disability and 100 per cent invalidity. He alleges that in applying the Scheme Regulations the Management Board laid undue stress on the

extent of disability attributable to the accident alone and was wrong to disregard the full extent of his disability. The Board should have recognised his total invalidity and work disability and granted him the benefits provided for under article 23 (4) of the 1962 Regulations of the Scheme. Under that article, he alleges, any Scheme member who is the victim of an accident at work is automatically entitled, as well as his spouse and children, to full compensation for his disability, whatever the extent to which it is attributable either to the accident itself or to psycho-pathological sequelae. Under Swiss law and jurisprudence governing private insurance account must be taken of such sequelae in calculating a disability pension. That law may be invoked as a supplementary source because of the vagueness of the Scheme Regulations and because the Scheme is reinsured with a private Swiss insurance company.

G. In its reply the Organization expresses the view that any link of causation between the accident and the complainant's present condition is unlikely. Either the mandrel was so heavy that he was bound under the safety regulations to use lifting apparatus and was therefore negligent; or else the mandrel was an object which a mechanic was normally expected to lift, in which case the accident was commonplace and due to his carelessness. It can hardly be regarded as a work accident since it must then be attributable to a more or less exceptional external cause. The poor physical and mental condition of the patient - particularly his sensory disorders, sinistrosis and neurotic pursuit of his claims - can be explained only by a debility prior to the accident. As to the legal position, although the Organization waives its objections to the Tribunal's lack of competence (jurisdiction having been conferred not by the Scheme Regulations of 1959, but only in 1967), it cannot agree that the complainant should variously invoke the Regulations of 1959, 1962 or 1967 to suit his purpose. If Swiss law and jurisprudence are relevant as a supplementary source, it is the provisions relating, not to private insurance, but to compulsory insurance which apply. According to Swiss case law, the calculation of a disability pension must discount the extent of disability attributable to a pyscho-pathological condition such as a neurosis. In the present case many highly qualified specialists have found the accident of 14 July 1960 to be the cause of only 10 per cent disability. The Organization therefore requests the Tribunal to quash the arbitrators' decision of 10 May 1968 and reduce the disability pension to 10 per cent. It invites the Tribunal to carry out a further inquiry and to summon him before it.

H. In his rejoinder the complainant repeats the substance of his arguments, particularly with regard to the conclusions relating to the applicable law and to the objective sequelae of the accident recognised by all the doctors. He points out that on joining CERN he underwent two medical examinations and was admitted to the Scheme without limitations; the existence of a debility prior to the accident cannot therefore be invoked. Several documents in the dossier attest to his satisfactory performance at CERN of arduous work calling for considerable physical effort. There was no lifting equipment in the workshop simply because, as a document in the dossier signed by several colleagues shows, in the interests of economy the administration had neglected to supply it, despite the requirements of the safety service.

I. In its reply to the rejoinder, the Organization objects that the complainant's predisposition was psychological and explains his present condition of sinistrosis. Such a predisposition could not have been detected in the course of the medical examinations which the complainant underwent on joining CERN. Moreover, according to the safety regulations, for the handling of heavy objects use should be made of mechanical lifting equipment. In disregarding this rule the complainant was seriously at fault. Provision 23 (4) should be interpreted to mean that the person concerned should receive in full an allowance based on the extent of disability attributable to the work accident without the reductions required by provision 23 (3) (partial benefits scheme). Membership of the CERN Scheme, being compulsory, is similar to compulsory Swiss insurance. Swiss federal law reduces the benefits payable if the accident is due to serious negligence. Moreover, even if the Swiss legislation relating to private insurance were applicable, it would still be necessary to establish an adequate link of causation between the accident and the sinistrosis. The latter is, however, either simulated or a psycho-pathological condition prior to or independent of the accident. The defendant organisation accordingly continues to urge rejection of the complaint.

CONSIDERATIONS:

The information at present available does not enable the Tribunal to assess, with full knowledge of the facts, the degree of invalidity from which Mr. Miele is at present suffering, nor the extent to which that degree of invalidity is attributable to the accident which he suffered in the course of duty on 14 July 1960.

In these circumstances, and following moreover, the complainant's arguments and in view of the request made by the Organization, an examination should be carried out by two medical experts.

DECISION:

For the above reasons,

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 Organization 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.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and Mr. A.T. Markose, Deputy 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 November 1969.

(Signed)

M. Letourneur
André Grisel
A.T. Markose
Bernard Spy

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