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

NINETIETH SESSION

***In re* Filthuth** **Judgment No. 2008**

The Administrative Tribunal,

Considering the complaint filed by Mr Heinz Filthuth against the European Organization for Nuclear Research (CERN) on 22 December 1999, CERN's reply of 10 April 2000, the complainant's rejoinder of 6 June and the Organization's surrejoinder of 25 September 2000;

Considering Articles II, paragraphs 5, 6 and 7, 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 physicist of German nationality born in 1925, was a member of CERN's permanent staff from 15 February 1955 to 29 February 1964. As such, he had compulsory health insurance and cover for his family with the Organization's own insurance scheme. The scheme was governed by a Health Insurance Agreement between CERN and the *Caisse maladie suisse d'entreprises* until 31 December 1970. Since then, it has been governed by another agreement which CERN concluded with the insurance company "Austria".

As from 1 March 1964, the complainant was employed by the University of Heidelberg (Germany) as physics teacher. CERN then appointed him as a "consultant" with the status of "visitor", a category of non-permanent staff, on a yearly contract which was renewed several times. Since CERN's health insurance scheme allows "visitors" to subscribe on a voluntary basis, the complainant chose to remain in the scheme for the duration of his appointment as a consultant.

His last contract ended on 28 February 1973. By letters of 27 February and 2 April 1973, CERN told him that he could remain in its health insurance scheme on a voluntary basis for one year at most, as was allowed under Article 22.1 of the Health Insurance Agreement which says: "Where a person provided for under paragraph A of Annex I to the present agreement ceases to be employed at CERN for any reason, without being entitled to become a beneficiary under the terms of paragraph B of the said Annex, the Insurers shall continue to insure him or her and/or the members of his or her family for a further period of twelve months according to the conditions governing premiums and benefits set out in the present agreement, provided that the insured person and/or the beneficiaries so request." (1)

Notwithstanding the terms of the above article, the affiliation of the complainant and his family was maintained tacitly beyond the stipulated period.

The complainant divorced in 1979 and then remarried. He had a daughter on 14 March 1979.

By a letter of 22 June 1983 Austria sent the complainant a proposal for coverage by its Swiss subsidiary and asked him to take out a new policy. Following a similar request from Austria in 1991, the complainant took the matter up with CERN. On 15 April 1991, the senior administrative officer in charge of health insurance sent him a copy of a letter of the same date which he had written to Austria. It said that in view of the complainant's age and the fact that his membership of the scheme had been maintained tacitly for more than ten years, CERN's health insurance would continue to cover him and his family. In his covering letter to the complainant, the administrative officer asked him to seek health coverage under the social security system of his country of residence, which was

Germany.

On 27 November 1994 the complainant wrote to Austria asking it to cancel his policy as from 1 December, but changed his mind on 25 January 1995.

By a letter of 11 August 1997 the Director of Austria told him that as from 31 December 1997 he and his family could no longer be covered by the CERN scheme. In a letter of 21 November 1997 the complainant informed Austria that because of his age he could not have health coverage under the German social security scheme. By a letter of 30 June 1998 CERN's Director of Administration allowed him to remain in the Organization's scheme but excluded the members of his family as from 1 July 1999, on the grounds that they were eligible for cover under the German scheme. The complainant protested against that decision in a letter of 20 July 1998, but the Director of Administration upheld it on 5 October and on 31 May 1999 reiterated CERN's position in a letter to the complainant's counsel.

By a letter of 28 July 1999 the complainant appealed against CERN's decision to exclude his family from its health insurance scheme. On the same date he applied to the Director of Austria for arbitration under Article 12.1.2 of the Health Insurance Agreement. By a letter of 21 September Austria sent him a proposal for a different health insurance contract. By a letter of 24 September 1999, the impugned decision, CERN rejected his appeal as irreceivable *ratione personae* pursuant to Article R VI 1.06 d) of the Staff Regulations, and subsidiarily as devoid of merit.

B. The complainant submits that his complaint is receivable because he does have *locus standi*. Citing the case law he explains that the right he is seeking to assert arises from his status as a former staff member of CERN. Furthermore, if he had no link with CERN, how could it apply its rules to him and take a decision that affected him adversely? Even if CERN could apply its rules to someone outside the Organization, due process would require it to extend to that person the same means of redress as the rules afford to staff.

The complaint is also receivable because it was filed within the time limit: it challenges the decision of 30 June 1998, which became final on 24 September 1999; it was thus filed within the ninety days laid down in Article VII(2) of the Tribunal's Statute.

The complainant has three pleas on the merits. The first is breach of the principle of proportionality. CERN's exclusion of the members of the complainant's family from its insurance scheme caused the complainant serious injury without producing any significant benefit for the Organization. Secondly, there was breach of the principle of legality. The complainant being insured under the Agreement, his family has cover *ipso facto* pursuant to its Annex I(B) and so cannot be excluded lawfully for as long as he is insured. Besides, the Agreement makes no provision for exclusion. Thirdly, CERN breached the principle of good faith: by maintaining the complainant (and hence his family) tacitly in its insurance scheme for twenty-seven years, it created legitimate expectations that the situation would last.

He asks the Tribunal to quash the impugned decision; confirm that the membership of his wife and daughter in CERN's health insurance scheme is maintained; order the reimbursement, pursuant to the conditions set in the Agreement, of the medical expenses incurred by his wife and daughter since 1 July 1999, plus interest at the rate of 5 per cent a year between the date that payment is made and the date of this judgment; and award him moral damages and costs.

C. In its reply CERN submits that the complaint is irreceivable.

First, it is irreceivable *ratione materiae*. Although a former official may lodge a complaint with the Tribunal, it will be receivable only if he is alleging some right arising under his former appointment. The right the complainant asserts, however, does not derive from CERN's staff rules, but is inferred from an ad hoc arrangement authorised exceptionally by the Organization in its letter to him of 15 April 1991. Claims relating to any rights which may derive from an informal arrangement of this sort are not within the Tribunal's competence.

The complaint is also irreceivable *ratione temporis*. Not being a CERN staff member, the complainant was barred from filing an internal appeal under Articles VI 1.01 and R VI 1.06 of the Staff Rules and Regulations. He should have taken his case directly to the Tribunal within ninety days after the decision of 30 June 1998 was notified to him. The letters he received subsequently do not constitute new decisions giving rise to any new time limits. CERN

also points out that he went to the Tribunal without responding to Austria's insurance proposal of 21 September 1999.

CERN adds that the case law the complainant cites to illustrate the Tribunal's interpretation of what constitutes a staff member relates not to the Organization's own rules defining the persons covered by its internal appeal procedures, but to the rules on the receivability of complaints to the Tribunal.

In subsidiary pleas CERN submits that the complaint is unfounded. According to Article 22.1 of the Agreement, a staff member who leaves the Organization may, upon request, retain membership of the CERN health insurance scheme for twelve months at most. Recounting the circumstances of its non-renewal of his contract as consultant, CERN explains that while he did remain in the scheme beyond the statutory limit, it was as a result not of some entitlement conferred on him by CERN rules but of an arrangement made by the Organization "*ex gratia*" because he was facing personal difficulties. That arrangement, of which the complainant was informed in the letter of 15 April 1991, was not granted unconditionally, and especially not indefinitely. Furthermore, the fact that CERN allowed him to remain in its health insurance scheme did not imply that it also had to cover the members of his family, who can and should join another scheme in their own interests.

D. In his rejoinder the complainant objects to CERN's reference to "events dating back more than twenty-five years which are in no way relevant to this case, in an attempt to discredit him in the eyes of the Tribunal". He asks to have the reference eliminated: it is quite superfluous since, as CERN acknowledges, his membership of the insurance scheme for a year after the end of his contract was perfectly in keeping with Article 22.1 of the Agreement.

He submits that, while his wife may fulfill the formal requirements for joining a private insurance scheme, in view of her age (fifty-seven) and medical records, such insurance would secure her little protection: premiums would be high and she would be subject to numerous medical reservations. He adds that Austria's proposal of 21 September 1999 was unacceptable because it infringed Swiss law.

E. In its surrejoinder CERN explains that it referred to certain events in the complainant's past so that the Tribunal would understand the unusual circumstances in which it kept him on in its insurance scheme beyond the statutory period, and realise the extent of its good will.

CERN maintains that the complainant's wife does meet the requirements for private health coverage in Germany and asserts that Austria's insurance proposal was perfectly lawful and contains no medical reservations. What is more, Austria informed CERN that on 19 September 2000 the complainant stated his intention of accepting an insurance offer for himself and his family with retroactive effect from 1 July 1999.

CONSIDERATIONS

1. From 15 February 1955 to 29 February 1964 the complainant was an established member of the CERN staff and as such was affiliated, together with his family, to the Organization's health insurance scheme, which at the time was managed by the *Caisse maladie suisse d'entreprises*. Thereafter, he was employed on consultancy contracts until February 1973 and was thus able to remain in the CERN scheme, which was administered by the insurance company Austria as from 1 January 1971. Owing to circumstances which are immaterial to this case, his appointment as a consultant was not renewed. Upon expiry of his last contract, he and his family were allowed to remain for one year in the scheme managed by Austria, that is until the end of February 1974. Thereafter his membership of the scheme was maintained tacitly and from time to time he was reminded that he should seek health coverage elsewhere. Finally, on 11 August 1997 Austria told him that his eligibility for membership of CERN's health insurance scheme had lapsed years ago and that his cover would end as from 31 December 1997. The complainant pointed out that because of his age he could not be accepted by the health insurance system of his country of residence, Germany, and on 21 November 1997 asked Austria to reconsider his case. Austria forwarded his request to CERN. By a letter of 30 June 1998 CERN's Director of Administration told the complainant that, in view of the circumstances, his membership of the Organization's insurance scheme would be maintained but that cover for the members of his family would end on 1 July 1999.

2. On 20 July 1998 the complainant asked the Director of Administration to reconsider his decision insofar as it

affected him adversely, but his request was rejected on 5 October 1998. He then engaged the services of a lawyer, who wrote to CERN on 11 March 1999 enquiring whether it would continue to cover the complainant's family, but the Organization wrote back on 31 May 1999 upholding its refusal.

3. On 28 July 1999 the complainant filed "an appeal under Chapter VI of the CERN Staff Rules and Regulations against the decision ... of 30 June 1998 ... upheld by [the] letter ... of 5 October 1998 ... supplemented by the further explanation sent in [the] letter ... of 31 May 1999 to [his] counsel, insofar as it excludes the members of [his] family from insurance cover for the risk of accident/sickness under the Health Insurance Agreement ... concluded by CERN and AUSTRIA". The Organization rejected the appeal on 24 September as irreceivable under Article R VI 1.06 d) of the Staff Regulations and, subsidiarily, as devoid of merit. That is the decision challenged before the Tribunal in a complaint registered on 22 December 1999.

4. CERN submits that the Tribunal is not competent to entertain the complaint because, having left CERN many years ago the complainant is not in a position to assert any statutory or contractual rights: he benefited from a special extra-statutory arrangement made *ex gratia* and may not assert for his family any right arising under the terms of his appointment. The objection to the Tribunal's jurisdiction fails: CERN allowed its former employee to retain coverage by a health insurance scheme which he had originally been able to join only because of his employment relationship with the Organization. Whether the continued protection he was granted - albeit *ex gratia* - may also be extended to his family can be determined only by ascertaining his rights as a former employee of the Organization.

5. The receivability of the complaint is seriously in doubt because the internal appeal was filed more than a year after the notification of the decision of 30 June 1998, which the later decisions merely confirmed. However, the Tribunal need not rule on the Organization's objection to receivability, since the complaint fails on the merits. The complainant's only argument is that the impugned decision caused him injury far in excess of the benefit it brought to CERN, and breached the principle of good faith as well as the guarantees afforded him by the Agreement between CERN and Austria. But the evidence shows that he had ceased to be eligible for membership of the CERN health insurance scheme years before, and that although the Organization allowed him *ex gratia* to remain in the scheme, it nonetheless asked him several times to put his position right by joining a sickness insurance scheme in Germany or, if he was unable to obtain coverage for himself, at least to insure his wife and daughter. He relies on the letter of 15 April 1991 informing him that insurance cover for himself and his family would be maintained. But that letter cannot in good faith be construed as establishing the benefit indefinitely. There was no breach of the Agreement between Austria and CERN, because the complainant himself was not entitled to prolongation of the benefits deriving from his membership. Far from disregarding the principles of good faith, legitimate expectations and trust which an organisation must observe in its relations with its staff, CERN more than once showed solicitude towards the complainant's situation and that of his family by giving him appropriate advice and agreeing to maintain him in its scheme.

6. The conclusion is that the complainant's pleas must fail. Moreover, the Tribunal sees no reason to allow his claim to the removal from the file of certain facts which are of no relevance to the case. Although they are irrelevant to determining whether the complainant's arguments are legally sound, CERN was right to bring them to the attention of the Tribunal in order to make matters clear, and they will remain on file as confidential.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet

1. Registry's translation

Updated by PFR. Approved by CC. Last update: 19 February 2001.