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

NINETY-FOURTH SESSION

Judgment No. 2174

The Administrative Tribunal,

Considering the second complaint filed by Mr N. J.-C. B. against the European Organization for Nuclear Research (CERN) on 17 December 2001 and corrected on 10 January 2002, CERN's reply of 17 April and the complainant's letter of 17 June 2002 informing the Registrar that he would enter no rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to the present dispute are to be found in Judgment 1901 delivered on 3 February 2000, on the complainant's first complaint, the salient points of which are as follows. In February 1995 the complainant dismantled and removed a large number of components of the Proton Synchrotron accelerator. A psychiatric report drawn up a few weeks later found that at the material time he had been suffering from "a mental disorder depriving him of his power of judgment". By a letter of 16 March the Director-General told him that he would be dismissed as from 31 March 1995 for "unspeakable behaviour". In a letter of 29 May 1995 the complainant informed the Director-General that he would not challenge that decision.

In his first case the complainant sought payment of an incapacity pension, but the Tribunal disallowed the claim because he had not been dismissed on grounds of medically confirmed incapacity. Ruling on a subsidiary claim to a pension for unsuitability, the Tribunal noted that since he had undergone no medical examination upon termination of service, the CERN Pension Fund ought to determine whether at the time of his dismissal he was to be treated as unfit for work because of physical or mental illness. The Tribunal found that the Administrator of the Pension Fund was wrong in refusing to consider the complainant's entitlement to a pension for unsuitability. It therefore sent 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".

In July 2000, in execution of Judgment 1901 CERN called on a professor from the Geneva Institute of Forensic Medicine to carry out the end-of-service medical examination in order to determine the complainant's state of health. In his report of 11 May 2001 the professor found that the complainant's earning capacity was "nil" both in February 1995 and at the date of the examination. The Leader of the Human Resources Division wrote to the complainant on 4 July 2001 informing him that he appeared to fulfil the requirements for payment with retroactive effect of a pension for unsuitability and seeking further information.

The complainant wrote back on 25 July 2001. Citing the findings of the report of 11 May, he claimed sickness benefit as from 13 February 1995 and recognition that the cause of his incapacity was medical. He also asked for his claim to be forwarded to the Joint Advisory Rehabilitation and Disability Board. In a letter of 27 July he asked the Director-General to reconsider the decision of 16 March 1995 to dismiss him, and to implement the procedure for termination on grounds of medically confirmed incapacity and accordingly consult the Board. The Director of Administration replied on 19 October that Judgment 1901 having found that decision to be "definitive in its

entirety", the matter was *res judicata* and his claim was accordingly rejected.

On 27 November 2001 the complainant filed an appeal with the Director-General and at the same time asked to be granted permission before 10 December 2001 to go directly to the Tribunal. He filed this complaint on 17 December impugning the decision of 19 October 2001. In a letter of 15 March 2002 the Director of Administration informed him that his appeal was irreceivable.

B. The complainant contends that, contrary to CERN's assertion, he is not challenging a decision on a matter on which the Tribunal has already ruled. Judgment 1901 found that his claims pertaining to the decision to dismiss him were irreceivable because he had not exhausted the internal remedies, and that they were inconsistent with the letter of 29 May 1995. Since the Tribunal did not go into the merits, *res judicata* does not arise.

In his view the case turns on whether an organisation may reconsider a decision to dismiss a staff member which has become final, when new evidence emerges. He sees as new facts the results of the medical examination of 11 May 2001 which show that at the time of his separation he suffered from incapacity due to an illness which was at the root of the acts of sabotage that prompted his dismissal. Reconsideration is possible, he says, by virtue of a general principle of law which allows review of administrative decisions that have taken effect. The letter of 29 May 1995 is no obstacle because at that time he lacked any power of judgment, and a letter of 10 November 1995 shows clearly that his intention not to challenge the reasons for his dismissal no longer stood.

He further submits that according to Annex 2 of Administrative Circular No. 14 which deals with service-incurred invalidity, a former staff member may claim "invalidity benefits" up to ten years after termination even where the incapacity was not medically confirmed at the time of dismissal. The Director-General was therefore wrong to reject his claim of July 2001; he ought to have consulted the Joint Advisory Rehabilitation and Disability Board to determine whether there were grounds for granting him an incapacity pension for an illness which was medically confirmed after, but had started before, his termination.

The complainant asks the Tribunal to quash the decisions of 16 March 1995 and 19 October 2001, to declare that he was dismissed on grounds of medically confirmed illness, to order the Director-General to refer the matter to the Board, and to award him costs.

C. In its reply CERN contends that the complainant's real intent is to challenge again the decision of 16 March 1995. But that decision has become final. CERN is indignant that, having expressly stated that he would not challenge his dismissal, the complainant should revert to a matter which by virtue of Judgment 1901 is now *res judicata*.

CERN objects to receivability insofar as the complaint challenges the decision of 19 October 2001, which merely confirmed a position that CERN had already taken many times. Although Judgment 1901 required consideration of his entitlement to a pension for unsuitability, that gave the complainant no right to force the Organization to change the conditions of his dismissal and take a new decision as to payment of an incapacity pension - a claim which was in any case dismissed on the merits in Judgment 1901.

In subsidiary pleas CERN submits that, the decision of 16 March 1995 having become final, the findings of the professor's report on a medical examination that took place seven years after the facts do not constitute grounds for reversing the decision or calling into question the stability of the parties' position in law. Nor can they be treated as new facts, since it had already been acknowledged in May 1995 that the complainant's judgment was impaired.

The sole purpose of that report was to enable CERN to assess the complainant's entitlement to a pension for unsuitability in execution of Judgment 1901; and it told him on 22 February 2002 that the pension would be granted with retroactive effect from 1 April 1995. The report's findings as to his earning capacity do not entitle him to an incapacity pension. The conditions for the grant of sickness benefits for a service-incurred illness are quite different from those governing pensions for incapacity which is not service-incurred. The analogy the complainant seeks to establish does not stand up to scrutiny. His claim to sickness benefit is both time-barred and devoid of merit.

CONSIDERATIONS

1. The complainant, a former staff member of CERN, was dismissed on 16 March 1995 for exceptionally serious

misconduct following incidents which are recounted in Judgment 1901, delivered on 3 February 2000. In that judgment the Tribunal quashed a decision by the Chairman of the Governing Board of the CERN Pension Fund refusing to consider the complainant's entitlement to a pension for unsuitability, and sent the case back to the Pension Fund for an assessment of that entitlement. It rejected other claims by which he sought the quashing of the decision to dismiss him for serious misconduct rather than for "medically confirmed incapacity", which could have entitled him to an incapacity pension.

2. Pursuant to that judgment CERN called on a medical expert to carry out the medical examination that the complainant should have undergone upon separation in order to determine his state of health at that time. On 11 May 2001 the expert issued a report concluding that the complainant's earning capacity was nil both at the time of his termination and upon examination. On the strength of those findings the Leader of CERN's Human Resources Division told the complainant on 4 July that his unsuitability was to be treated as having been duly established, within the meaning of Article II 4.02 of the Pension Fund Rules, at the time of the end-of-service medical examination and that, pursuant to Article II 4.04 of the Rules he qualified for a pension for unsuitability with retroactive effect from the termination of his contract, i.e. from 1 April 1995.

3. Relying on the expert's findings, in a letter of 25 July 2001 to the Leader of the Human Resources Division the complainant claimed sickness benefit as from 13 February 1995 and recognition that the cause of his incapacity was medical. He also sought referral of his claims to the Chairman of the Joint Advisory Rehabilitation and Disability Board. In a letter of 27 July 2001 he asked the Director-General to review the decision to dismiss him, citing "new facts and evidence arising from the findings of the medical examination of 11 May 2001". On 19 October 2001 the Director of Administration replied on the Director-General's behalf that the decision had been treated as final by the Tribunal in Judgment 1901, which carried the authority of *res judicata* and that, as indicated previously, he could claim a pension for unsuitability once he had furnished certain particulars. On 27 November 2001 the complainant appealed against that decision. On 23 January 2002 he sent the particulars requested and applied for the grant of an unsuitability pension "without prejudice to the claims he had filed for additional benefits, in particular in the form of an incapacity pension". The Administrator of the Pension Fund informed him on 22 February 2002 that he would get an unsuitability pension with retroactive effect from 1 April 1995 and an early retirement pension from 1 September 2002. That decision is not at issue here. As indicated above, the complainant filed an appeal with the Director-General against the decision of 19 October 2001, but it was rejected on 15 March 2002. He lodged a complaint with the Tribunal on 17 December 2001 claiming the quashing of the decision of 16 March 1995 to dismiss him and the decision of 19 October 2001. He also asks the Tribunal to order the Director-General to refer his case to the Joint Advisory Rehabilitation and Disability Board.

4. As CERN observes in its submissions, his claim to review of the decision to dismiss him is *res judicata*. The Tribunal dismissed a similar claim in Judgment 1901, pointing out that the decision of 16 March 1995 had "become definitive in its entirety" and that there was "no element that might lead the Organization to reconsider a decision it had taken three years earlier and which had become final". The medical examination was carried out for the sole purpose of ascertaining whether, at the time of his separation, he was eligible for an unsuitability pension. Its outcome can have no bearing either on the final nature of the decision of 1995 to dismiss him for serious misconduct or on a matter which is *res judicata*. Furthermore, the expert's report gave no assessment of the complainant's power of judgment when he expressly and repeatedly stated, through his counsel, that he would not challenge the dismissal.

5. The complainant is asking the Tribunal to order the Director-General to refer the matter to the Joint Advisory Rehabilitation and Disability Board for an assessment of his entitlement to an incapacity pension. The Tribunal responded to a similar claim in Judgment 1901, under 7, in which it pointed out that he had not been dismissed for medical incapacity and that it was no longer open to him to challenge the reasons for his dismissal. This claim too must accordingly fail.

6. Lastly, the complainant had sought payment of sickness benefit from 13 February 1995. This claim cannot succeed since it has been established that CERN paid him his regular salary until the date of his dismissal; and he may not in any event rely on the provisions of an administrative circular which does not apply to him.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2002, 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 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.