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

100th Session **Judgment No. 2512**

The Administrative Tribunal,

Considering the complaint filed by Ms M.H.L.B. against the European Organization for Nuclear Research (CERN) on 30 November 2004, the Organization's reply of 8 March 2005, the complainant's rejoinder sent on 30 May and CERN's surrejoinder of 12 September 2005;

Considering Article II, paragraph 5, 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. The complainant, a French national born in 1942, joined CERN on 15 June 1970 as an office typist. On 1 July 1980 she was appointed Administrative Secretary.

From 19 May 1998, when she was admitted to hospital after twice falling ill at work, the complainant was placed on sick leave.

On 9 April 1999 she initiated an internal procedure, with a view to obtaining from CERN recognition that her illness was of occupational origin.

By letter of 14 March 2002 the Director of Administration informed her that she was dismissed owing to a disability confirmed by a medical certificate with effect from 30 September 2002. He agreed, on behalf of the Director-General, to recognise that her illness was of occupational origin, in accordance with the recommendation of two experts selected by CERN. The Human Resources Division Leader informed her on 6 May that her illness was not considered to be "consolidated" and, by letter of 8 July 2002, that she had been granted a termination indemnity equivalent to 34 months' salary. As from 1 October 2002 the complainant received an incapacity pension.

In letters of 15 July and 10 October 2002 the complainant reported that her condition was consolidated and that a decision needed to be taken regarding the degree of her disability. The Human Resources Division Leader replied on 31 October that the Organization was under no obligation to take such a decision since consolidation was not established. On 5 December 2002 the complainant sent him two medical certificates, one of which stated that her illness had been consolidated since January 1999. On 4 March 2003 the Human Resources Division Leader notified her that her request could not be met, since it did not comply with the requirements of Annex 4 to Administrative Circular No. 14 (Rev. 1) of April 1988 concerning accidents and illnesses suffered by members of the personnel.

The complainant wrote to the Director-General on 26 March 2003. Pointing out that the date of consolidation of an illness, according to the circular, is not the date at which the illness becomes stable but the date at which no further improvement may be expected. Stating that she had been ill for almost five years, she asked for the consolidation of her illness to be confirmed and for the degree of her "occupational disability" to be determined. On 19 May the Director of Administration, on behalf of the Director-General, replied that, according to the opinion of one of the experts consulted, it had already been decided and confirmed that her illness was not consolidated. Before the Organization could address the issue of disability, she had to prove the contrary and to comply with the requirements of Annex 4 to Administrative Circular No. 14 (Rev. 1), by having a medical practitioner who, in her case, should be specialised in psychiatry, answer the list of questions appearing in that annex.

The complainant then sent CERN a medical certificate drawn up by a psychiatrist/psychotherapist, certifying that her illness was consolidated and that her degree of permanent disability was 60 per cent. As this certificate was judged to be insufficient, the new Human Resources Division Leader decided on 27 August 2003 to order a medical and technical examination as specified in Annex 3 to Administrative Circular No. 14 (Rev. 1). In a letter of

3 September 2004, which constitutes the impugned decision, the Head of the Human Resources Department sent the complainant the report drawn up by the office of Dr R., who had been appointed by mutual agreement between the medical practitioner chosen by the complainant and CERN's Medical Adviser. The Head of the Department informed the complainant that, since the expert had concluded – after noting that the illness had been consolidated since July 2003 – that her disability was non-occupational, the Organization did not have to take a decision regarding the degree of that disability.

B. The complainant argues that, since CERN has recognised that her illness was occupational, the resulting disability must perforce also be occupational. As the medical report shows, her illness has been consolidated since July 2003 and CERN must take a decision as to the degree of her disability.

In her view, the fact that the procedure has lasted for over six and a half years constitutes, for a "sick and infirm" person such as herself, a form of harassment in breach of the duty of care which any international organisation owes its staff.

The complainant asks the Tribunal to set aside the impugned decision, to rule that her disability is occupational, that the degree of that disability is 60 per cent, that consolidation occurred in July 2003 and that she has suffered moral injury. She claims payment of the benefit due in respect of disability of occupational origin, plus interest accrued from the date of consolidation, compensation for moral injury and costs.

C. In its reply the Organization contends that the complainant's claim – for the payment of an amount corresponding to the recognised degree of disability multiplied by 36 months of basic salary – is unfounded. In its view, the procedure for determining a degree of disability is independent of the procedure for establishing incapacity, so that the conclusion reached regarding the origin of the disability is not necessarily the same as that regarding the origin of incapacity. As it did in the case of the complainant's incapacity, it abided in all good faith by the opinion of the medical expert, who in the event found that the complainant's disability was not of occupational origin. It asserts moreover that it scrupulously followed the procedure for determining a degree of disability.

The defendant expresses surprise at the accusation of harassment. It has always shown sympathy to the complainant and granted her facilities, particularly regarding working hours, throughout her career.

D. In her rejoinder the complainant argues that although the respective procedures relating to incapacity and invalidity may sometimes be dissociated from one another, it hardly makes sense to maintain that the same illness can simultaneously lead to occupational incapacity and to a disability of non-occupational origin. She rejects the expert's conclusion regarding the non-occupational origin of her disability and the reasoning on which that conclusion is based. In her view, there is definitely a "sufficient causal link" between her occupational duties and her disability, and she denies that there was "any pre-existing cause". She points out that the question of harassment was already raised in the reports of the two experts consulted before her dismissal.

E. In its surrejoinder the Organization maintains its position. Referring to the Tribunal's case law, it submits that, even if it were assumed that the medical expert responsible for determining a disability was bound by the conclusions of the incapacity procedure, new facts can always "re-open a case". It argues that such facts arose in this case, since it was discovered that the complainant suffered from a pre-existing psychological condition, of which the expert took account in his conclusions.

CONSIDERATIONS

1. The complainant joined CERN in 1970. At the material time she worked as an Administrative Secretary. On 13 May 1998 her Division Leader sent her a memorandum informing her that following her return to the Project Co-ordination Office her performance would be assessed at the end of August. A few days after receiving that memorandum, the complainant twice fell ill at her place of work and was taken to hospital. She never took up her duties again. Her contract was terminated with effect from 30 September 2002.

2. Meanwhile, on 9 April 1999 she asked for her illness to be recognised as being of occupational origin. In accordance with the appropriate procedure, the Personnel Division Leader sent the complainant's file on 11 October to the Organization's Medical Adviser. On 29 October the latter concluded that the complainant's illness "[could]

not be deemed occupational" and that it was "far from stabilised". The complainant was informed by letter of 9 November from the Personnel Division Leader that her illness could not be deemed "occupational" within the meaning of paragraph 6.1.3 of Administrative Circular No. 14 (Rev. 1) concerning accidents and illnesses suffered by members of the personnel. By letter of 2 December 1999 she requested that the procedure referred to in section III, and more specifically paragraph 17, of that circular be initiated.

In application of that procedure, the Personnel Division Leader invited the complainant to appoint a medical practitioner who would endeavour to reach agreement with the Organization's Medical Adviser regarding the nature of her illness. She appointed Dr V. As the latter was unable to come to an agreement with the Medical Adviser, it was proposed, in view of the physical disorders affecting the complainant, that her case be referred to Professor G., a rheumatologist.

Alongside this procedure to identify the nature of the complainant's illness, another procedure was started under Article R II 4.19 of the Regulations, to determine whether the complainant's incapacity was such that she could no longer be retained as a member of staff, considering that she had been absent for more than 18 months in the course of the previous 36 months.

On 22 May 2000 CERN invited Professor G. to:

(a) identify the origin of the complainant's illness;

(b) determine whether she suffered from a disability; and

(c) establish whether or not the complainant could resume her duties.

On 4 August 2000 Professor G. concluded, regarding the nature of the illness suffered by the complainant, that the memorandum sent by her division leader on 13 May 1998 "appear[ed] to have triggered in [her] a state of anxiety-related depression on 15 May", since she had reported that she had "cried for a whole weekend". He added:

"[According to the] Administrative Circular No. 14 § 6.1.3: 'a 'non-occupational' illness within the meaning of § 6.1.1 above may be regarded as occupational if the person concerned can provide proof that there is a sufficient causal link between his/her occupational duties for the Organization and the illness'. In the light of that paragraph, it appears very likely that the state of anxiety-related depression was triggered by the content [of the memorandum] received by the patient [...]."

With regard to her disability, he considered that it did seem to be permanent and related to psychological disorders. In his view, the complainant might be considered to be suffering from a form of neurosis, and added that it was "a diagnosis which need[ed] to be confirmed by a psychiatric examination". A psychiatric test was proposed by the Organization's new Medical Adviser. Dr V. rejected that proposal on 19 December 2000. In view of this disagreement, the Director-General, in accordance with paragraph 17 of Administrative Circular No. 14 (Rev. 1), appointed Dr T. as psychiatric expert and asked him to answer, from a psychiatric point of view, the same questions that had been put to Professor G.

In a letter of 3 November 2001 Dr T. concluded that the complainant "[did] not suffer from neurosis [...], but that both the psychological disorders and the somatoform pains previously diagnosed [were] part of an occupational illness in the meaning of Administrative Circular No. 14, § 6.1.3".

By letter of 14 March 2002 CERN terminated the complainant's contract, whilst specifying that it accepted the experts' recommendation and that the complainant's illness had to be recognised as being of occupational origin. On 6 May 2002 the Leader of the Human Resources Division (formerly the Personnel Division) wrote to the complainant confirming the terms of the letter of 14 March, namely that her illness was "considered occupational, in accordance with paragraph 6.1.3 of Administrative Circular No. 14", but that the illness "[was] not consolidated".

In a letter dated 8 July 2002 the Human Resources Division Leader notified the complainant of "details concerning the administrative measures arising from the determination of [her] illness and the formalities related to the termination of [her] contract" in accordance with the relevant provisions of the Staff Rules and Regulations.

Acknowledging receipt of that letter on 15 July, the complainant raised the question of the degree of her disability.

In a further letter dated 10 October 2002, she urged the Organization to take a decision as quickly as possible.

In his reply of 31 October the Human Resources Division Leader informed the complainant that:

"A degree of disability needs to be determined only in the event of a permanent impairment of occupational origin of a person's physical condition; such degree may be determined only after consolidation.

In view of the above and of the information at our disposal, the Organization is not under an obligation to take such a decision."

On 5 December 2002 the complainant sent the Organization two medical certificates, one indicating that her condition was not improving and on the contrary was worsening, the other certifying that her illness was consolidated. She asked for the degree of her disability to be determined. Judging that these two medical certificates were not sufficient to make it change its view regarding its obligation to determine her degree of disability, the Organization wrote to the complainant on 4 March 2003 informing her that the "initial conditions required for the determination of a degree of invalidity [were] set out in Annex 4 of Administrative Circular No. 14 of April 1988" and that since her request did not comply with those requirements, it could not be met.

On 26 March the complainant wrote to the Director-General asking for confirmation that her illness was consolidated and for an assessment of the degree of her "occupational disability". The Director of Administration replied on 19 May, asking her to comply with the requirements of Annex 4 to the circular, failing which her request could not be reconsidered.

In response, on 6 July the complainant sent the Organization a further medical certificate establishing that her illness was consolidated. On 27 August 2003 the new Human Resources Division Leader informed her that this certificate did not contain all the information required and that he had decided that a medical and technical examination should be performed in accordance with Annex 3, paragraph 2.9, of Administrative Circular No. 14 (Rev. 1). The complainant nominated Dr F. and the Organization its own Medical Adviser to appoint an expert by mutual agreement. They eventually agreed on Dr R.'s office, which sent its report to CERN's Medical Adviser on 7 July 2004. The main conclusion of the report was that the complainant's neurosis "[gave] rise to permanent disability of non-occupational origin of approximately 60 per cent".

In a letter of 3 September 2004 the Head of the Human Resources Department forwarded this report to the complainant, informing her that the expert had confirmed that her illness was consolidated as from July 2003 and that "since the diagnosis indicat[ed] a disability of non-occupational origin, the Organization [was] not under an obligation to determine its degree".

It is this decision of 3 September 2004 which is impugned in the complaint.

3. The complainant's claims are set forth under B, above.

4. In the complainant's view, the only real question is whether her disability is occupational in the meaning of paragraph 6.1.3 of Administrative Circular No. 14 (Rev. 1), since the Organization has already admitted that such disability exists, that it is permanent and that it is consolidated. She maintains that the answer to this question is to be found in the letter of 3 September 2004 by which CERN told her as follows:

"Your illness was recognised as being of occupational origin on 6 May 2002.

[...]

The expert's examination, which was satisfactorily conducted, has established that your illness has been consolidated since July 2003. Since the diagnosis indicates a disability [...]."

She argues that since the Organization has "recognised that her illness was of occupational origin [...] and that it led to disability, this disability must also be of occupational origin".

Noting that the first signs of her illness appeared in May 1998, she submits that prolonging the procedure with countless medical examinations and requests for medical certificates, despite the fact that she is "sick and infirm", constitutes a form of harassment, which is contrary to the duty of care that any international organisation owes its

staff, and has caused her moral injury, for which she claims compensation.

5. In the defendant's view, the complaint should be dismissed, since a disability of occupational origin was not recognised by the expert appointed by the two parties. It bases its arguments mainly on the distinction to be drawn between the procedure applied to determine whether the complainant could be kept on as a member of staff – i.e. the issue of incapacity – and what it considers to be the entirely separate procedure applied to determine a degree of disability. It points out that the conclusion that, "since the diagnosis indicates a disability of non-occupational origin, the Organization is not under an obligation to determine the degree of that disability", was reached not on the basis of its own assessment of the complainant's state of health but, as stipulated in Administrative Circular No. 14 (Rev. 1), on the basis of the medical report drawn up by an expert appointed jointly in accordance with paragraph 17 of that circular by its Medical Adviser and the medical practitioner of the complainant.

It submits that since the expert's diagnosis must be based on his own examination, it may obviously differ from those established previously. Thus, the procedure followed to determine the degree of disability will not necessarily lead to the same conclusion, regarding the origin of the disability, as that determining incapacity. The Organization states that it is clear that Dr R.'s office, rather than blindly recopying the conclusions arrived at previously by other specialists, carried out a detailed examination of the complainant, on the basis of which a new diagnosis was drawn up, covering inter alia the origin of the disability.

6. The relevant provisions of Administrative Circular No. 14 (Rev. 1) read as follows:

"6. Occupational illnesses :

[...]

6.1.3 a 'non-occupational' illness within the meaning of § 6.1.1 above may be regarded as occupational if the person concerned can provide proof that there is a sufficient causal link between his/her occupational duties for the Organization and the illness.

[...]

10. Disability : This term is applied to a member of the personnel who has suffered a permanent impairment of his/her physical or mental condition. The benefits listed in Annex 2 are payable in respect of disability of occupational origin.

11. The date of consolidation of an accident or an illness is the date from which the condition of the person concerned can no longer be expected to improve as a result of suitable medical treatment.

[...]

II. COMPETENCE

14. The occupational origin or otherwise of an accident or an illness, the degree of incapacity (see § 8), disability (see § 10) or unsuitability (see § 9), the date of consolidation (see § 11) and the recognition of a handicap (see § 12) are determined by a decision of the Director-General, as provided for in the CERN Staff Rules and Regulations. Such decisions are taken by applying the above definitions, on the basis of the medical conclusions reached on completion of the procedure described in III below and, where appropriate, after consultation with the Joint Advisory Rehabilitation and Disability Board. The person concerned is notified of the decision in writing.

[...]

III. PROCEDURE

[...]

17. If one of the parties does not accept the other's conclusions, the Director-General*, after consulting the Organization's Medical Adviser, will ask the medical practitioners appointed by him and by the person concerned to discuss the case between them in order, if possible, to come to an agreement. If they fail to do so, he shall ask

them to appoint an expert to decide the matter. If they refuse, or cannot agree on the choice of an expert, the Director-General* shall appoint one after consulting the Organization's Medical Adviser and the Joint Advisory Rehabilitation and Disability Board.

_____

* Or the Leader of the Personnel Division […]."

7. In the light of the above provisions, the Tribunal notes that, prior to sending the complainant the letter of 14 March 2002 in which the Organization notified her that it accepted the experts' recommendation and that her illness had to be recognised as being of occupational origin, CERN had correctly followed all the stages of the procedure prescribed for determining the nature of the illness.

Contrary to the argument put forward by the Organization, neither paragraph 17 of Administrative Circular No. 14 (Rev. 1), nor Annex 4 to that circular containing "standard questions to be put to medical practitioners asked to give an opinion in matters of permanent disability", justified querying the occupational origin of the complainant's illness, which had been recognised in the letter of 14 March 2002 and confirmed in the letter of 6 May 2002, which is perfectly explicit in that respect. In this letter, the Human Resources Division Leader wrote as follows:

"Further to the letter the Director of Administration sent you on 14 March 2002, I confirm herewith that your illness [...] is considered to be of occupational origin, in accordance with paragraph 6.1.3 of Administrative Circular No. 14. This illness is not consolidated."

This would indicate that the question of whether or not the complainant's illness was of occupational origin had been settled and that it was only a matter of awaiting consolidation in order to determine the degree of permanent disability, if appropriate.

It is with respect to determining this degree that the provisions referred to by the Organization, particularly Annex 4 to Administrative Circular No. 14 (Rev. 1), may be applied. This is done to establish where necessary whether an illness unconnected with the illness concerned, a prior infirmity or the consequences of previous accidents had any effect on the case concerned. Next to be established is whether there is any permanent disability due to the illness, and if so, what kind and to what degree, taking into account the percentages shown in CERN's table.

The Tribunal is of the opinion that the Organization could not rely solely on the expert's replies to the questions put to him in the course of the procedure for determining the degree of permanent disability in order to deny the occupational origin of the complainant's illness, considering that the latter had already been recognised as occupational at the outcome of the prescribed procedure.

The case law referred to by the defendant (see Judgment 618) is not relevant to this case, since the last expert's report cannot be deemed to constitute a new fact such as would justify reconsideration of the decision already taken, in accordance with the applicable rules regarding the occupational origin of the illness. The impugned decision must therefore be set aside.

8. Regarding the determination of the degree of disability and the date of consolidation, the Tribunal notes that the expert appointed by mutual agreement between the two parties decided on a degree of 60 per cent for the former and on July 2003 for the latter. Neither of these decisions met with any objections.

9. The complainant maintains that she suffered harassment and claims compensation for resulting moral injury.

In view of the circumstances, and notwithstanding the Organization's error regarding the origin of her illness when determining the degree of disability, the Tribunal considers that there was no evident bad faith on CERN's part. The Organization treated the complainant with sympathy throughout the procedure, as may be deduced from the submissions. There is no justification, therefore, for granting compensation for moral injury.

10. The complainant is entitled to costs, which the Tribunal sets at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Organization shall pay the complainant the benefit allowed in a case of occupational disability plus accrued interest of 8 per cent per annum from July 2003.

3. It shall pay her 5,000 Swiss francs in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.