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

FORTY-FIFTH ORDINARY SESSION

In re ZIHBER

Judgment No. 435

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Organization for Nuclear Research (CERN) by Mr. Bernard Zihler on 5 September 1979, CERN's reply of 15 January 1980, the complainant's rejoinder of 15 May and CERN's surrejoinder of 30 September 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles V.l.0l and 1.03 and III.2.01 of the CERN Staff Rules, Articles R.II.1.32, 4.15, 4.21 and 4.22 of the CERN Staff Regulations and CERN staff notice dated December 1974;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. On 21 December 1976 the complainant, a grade 6 technician appointed to the staff of CERN in 1972, suffered a work accident on CERN premises in Switzerland. While supervising the installation of apparatus, he was in communication with another CERN official by means of a telephonic micro-receptor called a "microtel". By what is known as the "Larsen effect" an announcement over the loudspeaker system was suddenly caught by the microtel. The amplification was so great that his left ear on which he was wearing the microtel, was injured, causing pain, giddiness and loss of hearing. The physician appointed by CERN, Dr. Huguenin, carried out a medical examination of the complainant and reported that he had suffered 2.2 per cent loss of hearing in the right hear, 48.3 per cent loss of hearing in the left car and total impairment of hearing of 7.96 per cent. The physician chosen by the complainant, Dr. Vicard, reported permanent 18 per cent disability, very slight pain and slight discomfort. On 7 February 1978 the complainant claimed, under paragraph 6.1 of a staff notice dated December 1974 on occupational accidents and diseases, compensation amounting to 18 per cent of a sum equivalent to three years' basic salary at the figure obtaining in January 1978. In April, however, Dr. Vicard acknowledged that his assessment, which he had based on the French system, corresponded to only 8 per cent disability under the CERN scale. That is the degree of disability which CERN assumed, and on 11 May 1978 it paid the complainant 7,875 Swiss francs, or 8 per cent of a sum equivalent to three years' salary at 32,808 francs a year. The complainant appealed to the Director-General on 18 May and then to the Joint Advisory Appeals Board. By a letter of 15 August 1979 he informed the Board that he desired (1) that disability should be determined at 18 per cent; (2) that the date taken for determining the effects of the accident should be 17 January 1978; and (3) that he should be awarded compensation for pain and discomfort. The Board recommended allowing claims (2) and (3), but confirmed disability at 8 per cent. On 5 June 1979 the Director-General decided to confirm the degree of disability at 9 per cent, agreed that the date for determining the effects of the accident should be 17 January 1978 - thereby increasing compensation from 7,875 to 8,165 francs - but refused to make the ex gratia payment of compensation claimed under (3). That is the decision now impugned.

B. In his complaint the complainant observes that neither the Staff Rules nor the Staff Regulations, nor the contract concluded between CERN and La Suisse Insurance Company, nor the sickness insurance agreement concluded by CERN with the Austria Company covers cases in which injury is attributable to negligence on the part of CERN. He argues that that does not mean that CERN bears no liability whatever for negligence. An industrial accident which was caused by negligence cannot be put on a par with one which was not. CERN is under an extra-contractual liability. The conditions for such liability are fulfilled since there were injury, a causal link, an unlawful act and negligence. The material injury is equivalent to loss of 8 per cent of probable average annual earnings up to the age of 65 years, or 3,520 Swiss francs, multiplied by the appropriate factor (17.24) under Stauffer-Schatzle scale 209 which the Swiss Federal Tribunal applies, or 60,684.80 francs, less the 8,165 already paid by CERN, giving a net total of 52,519.80 francs. The complainant assesses at 5,000 francs the moral prejudice attributable to chronic buzzing in the car, giddiness and impairment of hearing, and at 1,500 francs the moral prejudice caused by

CERN's dilatoriness. No one is questioning the cause of the accident: it was the SPS internal communication system on CERN premises. The unlawful act consisted in obliging the complainant to use equipment exposing him to danger against which he could not protect himself. That was a breach of Article III.2.01 of the Staff Rules, which reads: "The Director-General shall take the necessary measures to ensure that work is carried out under satisfactory conditions for health and safety". Lastly, CERN was negligent in failing to take the necessary measures to protect its employees from such accidents. The apparatus which caused the accident was installed by CERN technicians, who were aware of the danger of the Larsen effect.

C. In his claims for relief the complainant asks the Tribunal to confirm the degree of his permanent disability at 8 per cent the effects of the accident being determined at 17 January 1978 and to order CERN to pay him: 60,684.80 Swiss francs, plus 5 per cent interest from 21 December 1976, less the 8,165 francs already paid; (2) 5,000 francs plus 5 per cent interest from1 December 1976 as damages for moral prejudice; (3) 1,500 francs plus 5 per cent interest from 5 June 1979 as damages for the state of mental uncertainty by in which CERN's dilatoriness left him and (4) full costs, including a fair share of his lawyer's fees. Subsidiarily, he asks the Tribunal to order a resumption of the investigation and a reconstitution of the accident.

D. In its reply CERN contends, first, that the claims for relief are irreceivable in that they are wider in scope than those submitted to the Joint Advisory Appeals Board. The complainant asked the Board to determine 18 per cent disability in accordance with French law and award damages amounting to 18,371 Swiss francs for material injury, but made no claim for moral prejudice. Secondly, he has failed to show that there is any general principle of law prescribing liability for negligence. The law he is relying on is in fact that of Switzerland. The Tribunal is not competent to hear claims based on national law. Thirdly, his claim for damages amounting to 1,500 francs is irreceivable because it was not submitted to the Director-General and in regard to that claim he has therefore failed to exhaust the internal means of redress.

E. As to the merits, CERN observes that it is not subject to the law of the host countries, France and Switzerland. That is expressly stated in the CERN Convention and in its agreements with those countries. It is governed by its own rules: the Staff Rules adopted by the Council, the Staff Regulations drawn up in accordance with the Rules, and the staff notices issued by the Director-General under the Regulations. A social security scheme is prescribed by Article V.l.01 of the Staff Rules: "A social security scheme shall safeguard the members of the personnel and their families against the economic consequences of illness, accidents, disability, old age and death". Accidents are governed by a staff notice issued in December 1974 on occupational accidents and diseases. The benefits scheme to which it gives effect is based on the notion, not of negligence but of risk. When injury occurs the victim is paid lump-sum compensation: he need not prove negligence, and compensation is due whether there was negligence or not. The scheme is comprehensive and indeed more generous than the Swiss scheme which does not prescribe compensation for disability entailing no reduction in earning capacity. It is true that under the law in Switzerland and in France an action will lie for serious negligence, but that is by virtue of a general principle of quasi-tortious liability, the occupational nature of the accident being immaterial. The Tribunal is not competent to apply such law. As regards the claim for damages for suffering and discomfort, the physician chosen by the complainant found the suffering slight and the discomfort very slight. Swiss law takes no account of such minor forms of injury. Besides, if Swiss law did apply, the claim would be time-barred since it was not filed within the one-year time-limit set in section 60(1) of the Code of Obligations. The complainant has failed to establish any reduction in earning capacity in his employment and career at CERN. If he left CERN any reduction in his earning capacity at the time of his departure would then be taken into account in calculating his pension in accordance with Article 23.3 of the Regulations of the Staff Insurance Scheme of CERN. The first claim for relief is therefore unfounded. So is the third one - for damages amounting to 1,500 francs for the state of mental uncertainty in which CERN's dilatoriness left him. The delay was only 24 days and caused him no injury anyway. Lastly, the application for the resumption of the investigation and reconstitution of the accident is pointless: what is in dispute is, not the facts, but the law. CERN therefore asks the Tribunal to dismiss the complaint as irreceivable and unfounded.

F. In his rejoinder the complainant states, as to the facts that he was not aware of the dangers of the Larsen effect, whereas those who installed the communication system were. He is still suffering from giddiness, intermittent pain and a constant buzzing in his ear. It is therefore mistaken to describe the sequelae as slight or very slight. It is not true to say that he did not speak of moral injury until he filed his complaint. He spoke of it in a letter he wrote to the CERN Insurance Branch on 7 February 1978, and again when he gave evidence before the Joint Advisory Appeals Board. He observes that CERN is not denying that it was negligent but merely refusing to bear the legal consequences. As regards receivability, he argues that although in his complaint he alleges liability for unlawful acts and moral prejudice and that is indeed a new plea, his original appeal and his present claims are nevertheless

identical. Nor has he enlarged the scope of his claims: in their original form no specific sums were claimed, and he merely asked that his case should be considered and full compensation awarded. Besides, he was unable to claim specific sums since he did not have information on the benefits due to him; indeed the Appeals Board seriously rebuked the Organization on that score. As regards the Tribunal's competence, he has never relied on Swiss law, but on general principles of legal liability. He concedes, however, that he did not exhaust the internal means of pursuing his claim for 1,500 francs. As to the merits, he considers that, though actually based on CERN's extra-contractual liability, his claims may also be founded on its contractual liability: to assign him wittingly to dangerous work was to deny him that respect which the parties to a contract owe each other, according to the principle affirmed by the Tribunal itself in re Grasshoff (Judgment No. 402). Extra-contractual liability is a general principle of law which applies where CERN rules are silent, and it applies to all degrees of negligence except where there is an express provision, as in French and Swiss law, restricting it to cases of serious negligence. There is no such restriction in the CERN rules. Lastly, loss of earning capacity means not just a reduction in capacity for actual employment but a reduction in general employability.

G. In its surrejoinder CERN observes that there is no proof of the chronic buzzing in the complainant's ear, giddiness and problems of balance. It is surprised to see that, after citing the findings of his own doctor, Dr. Vicard, the complainant objects to his describing the consequences of the accident as slight and very slight. It points out once again that only in his complaint has the complainant claimed a specific sum as damages for moral prejudice. Lastly, it denies that it was negligent: a distinction must be drawn between a technical fault and fault in the legal sense. It reaffirms its arguments that the claims are irreceivable: the claims in the complaint are not the same as those made in the internal appeal, and the complainant is relying on new facts such as alleged damage to his financial prospects and a reduction in his earning capacity. In his internal appeal he claimed 18,371 Swiss francs as compensation for 18 per cent disability and, at the Appeals Board's last meeting, orally claimed moral damages amounting to about 7,000 francs. Now he is claiming compensation for 8 per cent disability and has reduced his claim for moral damages to 5,000 francs, while increasing his claim for compensation to 60,684.80 less 8,165 francs. He is therefore mistaken in saying that he did not claim specific sums from the Appeals Board. His allegation that he was not given information also casts doubt on his good faith since he had over a year in which to obtain the information he needed for stating his claims. As to the merits, CERN points out that the notion underlying compensation for occupational accidents and diseases in CERN is that it should not be founded on liability for risk but should be payable in all cases, In this as in any accident case a distinction has to be drawn between physical injury, for which compensation is due, and loss of earning capacity, for which a disability benefit may be due, CERN argues that the complainant suffered only physical injury, It doubts whether he may rely on the Grasshoff case since in that case the complainant had been wittingly and wilfully exposed to quite abnormal risk, The general principles of law may be invoked only where there are lacunae and in this instance the CERN rules are comprehensive: there is no need to supplement them with general principles of contractual or quasi-tortious liability. The reason for not awarding the complainant a disability pension is not that there is any gap in the CERN rules but that the doctors who examined him did not find any reduction in his earning capacity or any damage to his career prospects. There is a clear distinction between disability, or loss of a bodily function, and occupational disability, In this case there is no proof that the complainant's disability has in any way reduced his working capacity in his actual employment. He holds a contract without limit of time and is not expected to leave the Organization.

CONSIDERATIONS:

Receivability

1. According to the rule requiring exhaustion of the internal means of redress, as stated in Article VII, paragraph 1, of the Statute of the Tribunal, a complaint is not receivable unless the staff member has exhausted the means of resisting it which are open to him within the organisation. This rule means, first, that the complaint to the Tribunal must rely on the same essential facts, i.e. issues, as those relied on in the internal appeal proceedings and, secondly, that the complainant's claims must not exceed in scope the claims he submitted in those proceedings, There is nothing, however to prevent him from making submissions which he did not make in the internal proceedings. Since the Tribunal will apply the law proprio motu, there is no reason to forbid the complainant to draw to its attention considerations which it may take into account of its own accord.

2. The Tribunal will consider the question of receivability in the light of such principles.

(a) In the appeal he submitted on 7 February 1978 and again in his letter of 15 August to the Chairman of the Joint

Advisory Appeals Board the complainant claims the compensation prescribed under paragraph 6.1 of a staff notice dated December 1974 on occupational accidents and diseases, i.e. compensation amounting to 18 per cent of a sum equivalent to three years' basic salary at the figure obtaining in January 1978. At the meeting of the Appeals Board on 3 November 1978 the complainant's representative explained that the exact amount claimed was thus 18,370.80 Swiss francs. The claim in the present complaint is based on 8 per cent permanent partial disability and is for payment of compensation amounting to 60,684.80 Swiss francs, plus interest at 5 per cent a year from 21 December 1976, less the 8,165 already paid by CERN, giving a net total of 52,519.80 francs, plus interest.

CERN submits that, having claimed compensation for disability in his internal appeal, the complainant has improperly altered his claims for relief by adding a claim for compensation for loss of earning capacity and financial prospects. In other words, CERN pleads that the complainant has infringed a principle requiring that the facts relied on in the internal proceedings should be the same as those relied on in the complaint. The plea fails. As in the internal appeal proceedings, the complainant is now seeking compensation for the bodily injury he sustained in the accident of 21 December 1976. The fact he cites in support of his claim is therefore the same both in his complaint and in his internal appeal, namely his bodily injury, and he has not infringed the above-mentioned principle. It is immaterial that he claimed compensation for disability in his appeal and is claiming compensation for loss of earning capacity and financial prospects in his complaint. He has not changed the facts on which he founds his claims, he has merely drawn new conclusions from those facts.

The complainant has, however, as CERN rightly observes, widened his original claims. In the internal appeal he claimed compensation set by his representative at 18,370.80 francs and it is therefore not open to him to ask the Tribunal to grant him a larger sum. Insofar as he is seeking compensation exceeding 18,370.80 francs his complaint is therefore irreceivable.

(b) In the appeal he submitted to CERN on 7 February 1978 the complainant did not speak of damages for moral prejudice. But in his letter of 15 August 1978 to the Chairman of the Joint

Advisory Appeals Board and at the Board's meeting on 3 November 1978 he claimed compensation for moral prejudice amounting, according to his representative, to the difference between 25,000 and 18,370.80, or 6,629.20 francs. He is now claiming compensation amounting to 5,000 francs for moral prejudice, plus 5 per cent a year interest from 21 December 1976.

This claim is fully receivable. First, although the complainant claimed compensation for moral prejudice only after filing his appeal with the Appeals Board, he did seek such compensation from CERN, and his application was not dismissed on the grounds that it was time-barred. Secondly, the amount he is claiming in his complaint is less than the amount he claimed at the Board's meeting of 3 November 1978. He has therefore exhausted the internal means of redress.

(c) In his original memorandum the complainant sought compensation amounting to 1,500 francs, plus interest at 5 per cent a year from 5 June 1979, for the dilatoriness of the internal proceedings. In his rejoinder, however, he acknowledges that this claim was not submitted to the CERN authorities and is irreceivable, and he accordingly withdraws it.

The merits

3. The dispute is between the complainant and the organisation which employs him. The Tribunal will therefore apply the relevant terms of the contract and provisions of the Staff Regulations and Staff Rules. The provisions of municipal law are therefore irrelevant, and it is immaterial that the complainant is Swiss and that the accident of 21 December 1976 occurred on Swiss territory.

4. According to the degrees of permanent disability set out in the CERN scale deafness in one ear constitutes 15 per cent disability. On the basis of that figure one of the physicians consulted found that the complainant had suffered per cent loss of hearing in the right ear, 48.3 per cent loss of hearing in the left ear and a total loss of 7.96 per cent. Accordingly, in assessing the degree of disability at per cent CERN accepted the medical report, which is, besides, confirmed by a new scale referred to by the Appeals Board.

Paragraph 6.1 of the staff notice of December 1974 on occupational accidents and diseases, which bears the heading "Permanent disability", reads as follows: [(1)]"Payment of a lump sum proportionate to the degree of

disability, the maximum payable being three years' basic salary for a 100 per cent disability". This is the material provision, and CERN took it is the basis for determining the amount of compensation it paid at 8,165 francs.

CERN also agreed to take 17 January 1978, the date proposed by the complainant, as the date for determining the effects of the accident.

It appears from the foregoing that the impugned decision was in accordance with CERN rules.

5. The complainant acknowledges that himself. He argues, however, that according to a general principle of law CERN's internal rules do not apply because the Organization was guilty of negligence; in other words, that the general principle of law prescribing liability for negligence should supplement the Staff Rules and Regulations, which do not refer to that principle.

In fact CERN would have incurred liability beyond the requirements of the Staff Rules and Regulations only if it had exposed the complainant to a degree of danger incompatible with the normal performance of his duties and beyond the requirements of his contract of appointment. CERN did not expose him to such danger. It is therefore not necessary to consider whether the Organization has been negligent in that it failed to take precautions against the accident of 21 December 1976.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, 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 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

1. Registry translation.

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