

## SIXTY-FIFTH SESSION

### *In re* BORCARD

#### Judgment 927

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Kate Marlis Borcard, née Jessel, against the European Organization for Nuclear Research (CERN) on 25 November 1987, CERN's reply of 16 February 1988 and the complainant's letter of 18 April 1988 to the Registrar stating that she did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles R IV 1.13 and 2.4 and R A 5.01 of the CERN Staff Rules and Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Article R IV 1.13 of the CERN Staff Rules and Regulations reads: "A member of the personnel who is married or who has a dependent child ... shall receive a family allowance, the amount of which is shown in Annex R A 4. ... In the event of legal separation, divorce or a similar legal situation, this allowance shall be paid only if a children's allowance is also payable".

Article R IV 1.24 reads: "A non-resident member of the personnel shall be paid an allowance at the rates shown in Annex R A 5 ...". R A 5.01 states that for someone who gets the family allowance the amount of the non-resident allowance shall be 12 per cent of basic pay.

The complainant, a citizen of the Federal Republic of Germany, joined the staff of CERN in Geneva in 1964. She married Mr. Jean-Claude Borcard, a French citizen. CERN paid her the family allowance and the non-resident allowance. On 18 June 1985 she and her husband filed a joint petition with the French courts for a decree of divorce and for interim legal separation. On 11 October 1985 a court of Thonon-les-Bains, in Upper Savoy, made an order authorising trial separation. On 29 May 1986 they confirmed their petition for divorce and the French court granted it on 3 July.

By a minute of 30 September 1986 the Leader of the Personnel Department informed the complainant that, legal separation having been allowed by the court order of 11 October 1985, the Organization was discontinuing her family allowance and reducing the rate of her non-resident allowance from 12 to 9 per cent of basic pay as from the 1st of the following month, November 1985. In a letter of 7 October 1986 to the Director-General she lodged an internal appeal objecting to the date on which that decision took effect: she said that the date should be that of the divorce, 3 July 1986. In its report of 25 May 1987 the Joint Advisory Appeals Board held that the order of 11 October 1985 had not amounted to legal separation but had been merely a step in the divorce proceedings. The Board recommended allowing the appeal. By a letter of 11 August 1987, which the complainant says she got in September 1987 and which is the decision she challenges, the Director of Human Resources informed her that her appeal had been rejected.

B. The complainant submits that the order of 11 October 1985 neither amounted to "legal separation" as such nor created any "similar legal situation" within the meaning of R IV 1.13: it merely took the temporary measure, in keeping with her and her husband's petition for divorce, of allowing them to live apart for up to nine months. Failing reconciliation they were required to confirm their petition within that period.

The order is distinct in French matrimonial law from legal separation. Moreover, it created no new "legal situation", a vague term that presumably refers to the case where the spouses are living separately *de facto* and without judicial authorisation.

The complainant seeks the quashing of the decision and payment of the allowances as before and up to 3 July 1986.

C. In its reply CERN invites the Tribunal to dismiss the complaint as devoid of merit. It submits that the complainant is misconstruing R IV 1.13. The article intends that payment of the family allowance cease, not just with divorce, but with "legal separation". It draws no distinction between permanent and temporary separation but denotes one authorised by court order as against mere living apart de facto and so includes temporary separation authorised by a divorce court. That construction is in keeping with CERN practice. Spouses who have been granted such provisional legal separation in France are taxed separately.

#### CONSIDERATIONS:

1. The complainant and her husband filed a joint petition for divorce on 18 June 1985. After conciliation hearings the matrimonial judge of the Tribunal de grande instance of Thonon-les-Bains made an order dated 11 October 1985 giving effect to a temporary agreement regulating their affairs which was annexed to the petition.
2. The order stated that if they persisted in their intentions the petition ought to be renewed after three months period for reflection, but within six months thereafter at the latest, in default of which the petition would become spent. The effect of the order was to allow the spouses to live apart but not to oblige them to do so. The petition was renewed on 29 May 1986 and a decree of divorce was granted on 3 July 1986.
3. On 30 September 1986, on receiving notice of the divorce decree, CERN decided to stop the family allowance paid to the complainant as its employee and to reduce the rate of her non-resident allowance from 12 to 9 per cent of basic pay in accordance with Articles R IV 1.13 and R A 5.01 of the Staff Rules and Regulations as from 1 November 1985. The complainant contends that those measures should not have taken effect until 3 July 1986.
4. The Joint Advisory Appeals Board agreed with the complainant, but the Director-General did not: he decided on 11 August 1987 to follow the prevailing practice and treat the order of 11 October 1985 as analogous to legal separation or divorce. That is the decision impugned.
5. There is a single question of law to be determined, namely the correct interpretation of the following passage in Article R IV 1.13:  
  
"In the event of legal separation, divorce or a similar legal situation, this allowance [i.e. the family allowance] shall be paid only if a children's allowance is also payable."
- The complainant was not in receipt of a children's allowance.
6. Article R A 5 of the Staff Rules and Regulations provides for payment of a non-resident allowance at the rate of 12 per cent of basic remuneration to someone who is in receipt of the family allowance and at the rate of 9 per cent to someone who is not. Payment of the non-resident allowance at the higher rate therefore also depends on the interpretation given to Article R IV 1.13.
7. CERN has officials of many nationalities who are subject to different national law on personal status. Rulings on matrimonial issues and the name of the remedy will vary with the system of law. The Organization's Rules and Regulations are intended to provide against any contingency that divorce, legal separation or some similar legal situation may give rise to.
8. In this or any similar case the period of trial separation ordered by the court could have resulted in attempts at reconciliation or in no further action being taken within nine months. If the Organization's interpretation were correct the family allowance would cease when the trial separation began, but resume if there were an attempted reconciliation or if no further action were taken by the end of the nine months. It would be an intolerable intrusion into an official's private life if the Organization were free in that way to monitor the progress of a trial separation.
9. The temporary separation of the spouses prior to the decree of divorce, though authorised by a court order, was neither a "legal separation" nor a "similar legal situation" within the meaning of R IV 1.13. The trial separation is a preliminary to divorce required by law. It is limited in time and revocable. It has no effect on the marital status of the spouses, who may use it as they will. It is not in the same category as legal separation, which is a permanent solution.
10. Since the Director-General made a mistake of law in his interpretation of the rule his decision of 11 August 1987 must be set aside.

DECISION:

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay the complainant the family allowance and the deducted portion of the non-resident allowance for the period from 1 November 1985 to 3 July 1986, plus interest to be reckoned at 10 per cent a year.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner