

**SEVENTY-SIXTH SESSION**

***In re* BERNARD**

**Judgment 1321**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joseph Jacques Bernard against the European Organization for Nuclear Research (CERN) on 17 March 1993 and corrected on 8 April, CERN's reply of 5 July, the complainant's rejoinder of 10 September and the Organization's surrejoinder of 1 November 1993;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Rule II 6.01 g) of the CERN Staff Rules, Regulations R II 4.01, R II 4.09, R II 4.16, and R II 6.06.3 of the CERN Staff Regulations and Annex R A 10 g) to those Regulations;

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 French citizen, joined CERN on 1 April 1968 as a "supernumerary" assembler of electronic equipment. On 1 April 1972 he was granted a fixed-term appointment and he had it converted to an indefinite one on 1 July 1974. His last job at CERN was as an electronics technician.

He had to take sick leave several times in his last few years at CERN. Since such leave totalled almost 24 months over 36 his case was put to the Joint Advisory Rehabilitation and Disability Board on 8 November 1991 under Regulation R II 4.16 of the CERN Staff Regulations. In a letter of 19 November from its chairwoman to the Director-General the Board said that his poor health precluded "work of any kind" and recommended dismissing him, in accordance with Rule II 6.01 g) of the Staff Rules, on the grounds of "disability confirmed by a medical certificate" and "not incurred in the course of duty". It also proposed that since the Organization was required to give him three months' notice his appointment should be terminated at 29 February 1992 and that, in recognition of his 23 years' good service, he should be paid a "grant" equivalent to 10 per cent of the maximum amount prescribed in Annex R A 10 g) of the Staff Regulations.

By a letter of 29 November 1991 the head of Administration notified to the complainant the Director-General's approval of the Board's recommendations, and in a letter of 18 December the Personnel Division told him, among other things, that he would be "deemed to have taken the balance of ... annual leave during the period of notice" he was entitled to under Regulation R II 6.06.3.

In a letter of 26 March 1992 to the Leader of the Personnel Division he sought payment of compensation for accrued leave: "because I was on sick leave during the period of notice I was unable to take the 40 days' leave still due". The Leader of the Division rejected his claim in a letter of 9 April on the grounds that, under Regulation R II 4.09 of the Staff Regulations\* ("On termination of service, a member of the personnel who has not been able to take all his annual leave owing to the requirements of duty shall be paid an amount equal to the remuneration due for the period of annual leave to which he is entitled".), only where it is owing to "the requirements of duty" that annual leave has not been taken may compensation therefor be paid on termination.

On 20 May 1992 the complainant lodged an appeal against that decision with the Joint Advisory Appeals Board. In its report of 2 December the Board held that the financial terms of his dismissal "expressly" precluded payment of compensation for accrued annual leave and that if he were to succeed anyone might on retirement claim a sum in compensation equivalent to up to two months' pay. It therefore recommended against paying him for the accrued leave, and by a letter of 18 December the Director of Administration told him that the Director-General was upholding the decision. He wrote to the Director-General on 28 January 1993 asking him to reconsider, but the Director-General refused in a letter of 22 February, the impugned decision.

B. The complainant submits that annual leave granted under Regulation R II 4.01 is an entitlement intended to give staff time for rest. So someone will be entitled to compensation in lieu if he is unable to take such leave for reasons beyond his control, for example, where the Organization refuses leave or orders dismissal on the grounds of medically certified disability. CERN prevented him from using up his leave entitlement by terminating his appointment when he was on sick leave.

In his submission it is CERN's practice to make payment in lieu where death or some medically certified service-incurred disability precludes the taking of leave because those are reasons beyond the staff member's control, even though the Organization does not treat such contingencies as being covered by "the requirements of duty". So by analogy it should treat on a par someone whom an illness that is not service-incurred has prevented from taking annual leave.

The complainant asks the Tribunal to quash the Director- General's decisions of 18 December 1992 and 22 February 1993 and to award him payment for the 40 days' annual leave he did not take, possibly with interest, and costs.

C. CERN replies that the complaint is devoid of merit.

It points out that the complainant was dismissed in accordance with Rule II 6.01 g) on grounds of an illness that was not service-incurred and that under Regulation R II 4.09 compensation is due for any balance of annual leave only if the reason why the staff member was unable to take it was the requirements of duty. How can an illness which was not service-incurred, like the complainant's, come under such requirements? There can be such requirements only if the staff member is prevented from taking leave for reasons related to the performance of his duties.

CERN rejects the two pleas put forward by the complainant in support of his claim. He contends that the reasons for his dismissal related to the requirements of duty because it was the Organization that took the decision, but that is to blur the dismissal with the reasons why he had to stop work, and he is misreading R II 4.09. To submit that CERN should compensate accrued leave wherever any reason at all beyond his control may have prevented a staff member from taking all of it, is to overlook the condition for payment in R II 4.09, which is that the reason for not taking the leave should have been the requirements of duty.

Only in two contingencies is it CERN's practice to pay compensation when that is the reason for not taking leave: one is an overload of work and the other is service-incurred illness. By way of example the Organization cites the case of someone it dismissed - just a few months before the complainant left - on grounds of medically certified disability that was not service-incurred. Although on termination that employee still had a balance of annual leave that had accrued both while he was at work and during sick leave, he was paid compensation only for the days of leave that an overload of work, as certified by the head of his division, had prevented him from taking. There is no reason to treat the complainant any differently.

Lastly, CERN explains that although, being an "exceptional contingency", death does not come under the "requirements of duty" and although it is under no duty to do so, it pays the successors compensation for any balance of annual leave at the date of the staff member's death.

D. In his rejoinder the complainant acknowledges that in his last years at CERN he had to take sick leave several times. He points out, however, that that was because his working conditions, particularly between 1973 and 1976 - overwork, noise and so forth - caused a nervous breakdown. On what grounds can the Joint Advisory Rehabilitation and Disability Board have found that his illness was not service-incurred when he had no medical check-up but just an interview with its members?

Because of his ailments he had neither the opportunity nor the time to take all his annual leave during the period of notice, as CERN asked in its letter of 18 December 1991. What is more, the letter neither warned him he would get no compensation for the balance of leave nor mentioned Regulation R II 4.09, and he thought no more about the matter until the Leader of the Personnel Division wrote to him on 9 April 1992 referring to the Regulation. But by then the period of notice had long expired. So the Organization prevented him from properly defending his interests.

R II 4.09 does not define "requirements of duty". The construction CERN puts on it - which restricts payment for

any balance of leave to cases of service-incurred illness and death - is questionable or even far-fetched.

CERN is inconsistent: it refuses to compensate him for leave which his illness prevented him from taking but generously grants paid leave to employees who are perfectly fit as part of its so-called "voluntary" departure scheme.

He questions the impartiality of the Joint Advisory Appeals Board and wonders on what grounds it concluded that the financial terms of his dismissal "expressly" excluded payment in lieu of the leave he had not taken, and why it compared him to someone who had retired.

The precedent the Administration cites to illustrate its practice regarding payment for untaken leave is irrelevant: like him, the employee in question was prevented from taking all his leave by illness, the overload of work being merely incidental.

E. In its surrejoinder CERN submits that the complainant may not now challenge the findings about the origins of his illness: that that illness was not service-incurred is no longer at issue.

In its letter of 18 December 1991 CERN did not ask him to take all his remaining leave but merely pointed out that it was supposed to be taken during the period of notice so that he would know that he could make no claim for any leave he did not take. So its warning that he was subject to R II 4.09 did not come too late.

The Organization maintains that the term "requirements of duty" in R II 4.09 refers only to work and does cover service- incurred illness.

What the complainant says about the Board's partiality is unsupported and unfounded.

CERN does not pay compensation to someone who is granted special paid leave in the last few months before retirement.

#### CONSIDERATIONS:

1. CERN recruited the complainant in 1968 and granted him an indefinite appointment on 1 July 1974. Because he was in poor health his case was put to the Joint Advisory Rehabilitation and Disability Board, and on 19 November 1991 it declared him unfit for service. On its recommendation the Director-General decided on 29 November 1991 to dismiss him on 29 February 1992 - a date that took account of the required three months' notice - on the grounds of "disability confirmed by a medical certificate" and "not incurred in the course of duty". The Personnel Division told him in a letter of 18 December 1991: "You will be deemed to have taken the balance of your annual leave during the period of notice".
2. By a letter of 26 March 1992 he claimed the payment of the 40 days' leave he said he had been unable to use because he had been on sick leave during that period. But by a letter of 9 April 1992 the Leader of the Personnel Division answered that according to Regulation R II 4.09 of the Staff Regulations only where the reason for not taking annual leave was "the requirements of duty" would compensation be paid for such leave on termination. The complainant appealed against that decision to the Joint Advisory Appeals Board. In its report of 2 December 1992 the Board recommended rejecting the appeal, and the Director-General did so in a decision of 18 December 1992, the one now under challenge.
3. The only material issue is whether the complainant is entitled to payment of compensation for the balance of annual leave on termination. The gist of his pleas in support of the claim is that when CERN orders dismissal on the grounds of disability and the staff member cannot take annual leave in time the termination comes under "requirements of duty" within the meaning of R II 4.09.
4. The Organization demurs on the strength both of the material text and of its own usage. It is - says CERN - clear from R II 4.09 that to qualify for compensation for the balance of annual leave the staff member must have had his appointment terminated and must have been prevented from taking his annual leave "owing to the requirements of duty". CERN argues that the two conditions are distinct in that the reasons for termination may have nothing to do with the requirements of duty, for example where the official resigns or dies. There may also be dismissal, as in this case, on grounds of disability.

5. The Organization's reasoning is sound. The notion of "requirements of duty" is relevant only where such requirements have prevented the staff member from taking annual leave. An example of such requirements is a heavy burden of work; personal convenience or other reasons that have nothing to do with work will not do. So where the reason for not taking leave is an illness that is not service-incurred the case will fail to satisfy one of the conditions in Regulation R II 4.09 because the reason is not "the requirements of duty".

6. The complainant cites in support of his claim CERN's practice of paying compensation to the successors of a deceased staff member for any balance of annual leave at the date of death. The Organization itself acknowledges that death is not a contingency covered by the term "requirements of duty", provided that the death is not service-incurred. But the complainant may not rely on that exception, which is contrary to the letter of the rules. As the Tribunal has said more than once, a staff member may not rely upon an unlawful act or a benefit granted ex gratia to other staff in support of his own claim.

#### DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda  
E. Razafindralambo  
Michel Gentot  
A.B. Gardner