

EIGHTY-THIRD SESSION

In re Palma

Judgment 1665

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Francesco Palma against the European Organization for Nuclear Research (CERN) on 1 July 1996 and corrected on 1 October 1996, CERN's reply of 22 January 1997, the complainant's rejoinder of 22 February and the Organization's surrejoinder of 28 April 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

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. Under an agreement concluded in 1968 between the European Southern Observatory (ESO) and CERN as revised in 1983 and again in 1991, the staff of the ESO are participants in the Pension Fund of CERN.

The complainant, an Italian who was born in 1948, joined the staff of the ESO in September 1989. By a letter of 26 January 1995 the head of Personnel of the ESO told him that his contract, which was to expire at 31 August 1995, would not be renewed. In a memorandum of 6 June 1995 to the head of Administration he said that he had lost the sight of his left eye and wanted his case to go to the Rehabilitation Board. In its report of 14 July the Board assessed his loss of vision at 98 per cent and as corresponding to a degree of disability of 39 per cent. The Board took the view that though he had incurred such disability in the ESO's employ, it did not prevent him from performing his duties; he was to leave the Organization for other reasons. The Board recommended granting him a pension for "unsuitability" under Section 4 of Chapter II of the Rules of the CERN Pension Fund. The Pension Fund accordingly told him by a letter of 3 October 1995 that he would get a pension of 485 Swiss francs a month as from 1 September 1995.

The complainant appealed against that decision to the Governing Board of the Pension Fund on 30 November 1995 and supplied a brief on 13 December. He applied for the grant of an incapacity pension under Section 3 of Chapter II of the Fund's Rules. The Governing Board met on 18 April 1996 and decided to grant him under Article III 1.01 of the Rules, and as from 1 September 1995, *ex gratia* benefits equivalent to a 40 per cent partial incapacity. The monthly amount came to 2,141.50 Swiss francs in 1995. The Vice-Chairman of the Board so informed him by a letter of 7 May 1996, and that is the decision he is impugning.

B. The complainant contends that in determining the lawfulness of the Fund's decision the circumstances in which his appointment came to an end must be borne in mind. He says that since 1989 his work at the ESO had required him to spend time at a computer screen so that the myopia he had been suffering from since the age of 12 grew rapidly worse.

He says that in January 1994 his workload heavily increased and on 11 May 1994, while he was working at the screen, he felt a sudden pain in his left eye and suffered loss of sight which required him to seek emergency treatment. Only at the end of November 1994 did his own doctor give a sure diagnosis of permanent and serious incapacity and he says he so informed the Administration in December. On 17 January 1995 the ESO refused him an annual step increment. On 26 January it informed him without the slightest explanation that he was not to get the permanent appointment which he says was ordinarily granted to staff after six years' service, and his contract would not even be renewed.

He says that he was dismissed on account of a medically certified occupational disability. The doctor whom the Governing Board of the Fund consulted took the view that his "application for total incapacity is justified". So the material provision is not Article III 1.01 of the Fund's Rules, which is about *ex gratia* benefits, but Article II 3.02, which is about a pension for total incapacity.

The complainant seeks, among other things, the quashing of the impugned decision and asks that he be awarded a pension for total incapacity and all related benefits; that he be granted medical insurance coverage as from 1 September 1995; that all the case records be disclosed; and that he be awarded damages, including damages for loss of income up to the age of retirement; and 15,000 German marks in costs.

C. In its reply the Organization says that since the complainant is challenging a decision by the CERN Pension Fund it will not answer the complainant's pleas about his appointment with the ESO.

It says that he was not dismissed on account of any medically certified incapacity: his contract simply was not renewed. He therefore failed to qualify for an incapacity pension. The Pension Fund merely applied its own rules to his contractual situation, which is the concern of the ESO and of no other organisation. The Fund was entitled to grant him *ex gratia* benefits in accordance with Article III 1.01 of its Rules if it took the view that his case was "very exceptional".

The defendant further submits that the complainant's claim to orders against the ESO is irreceivable because his complaint is addressed to CERN. His claim to medical insurance coverage is irreceivable because it did not form part of his internal appeal. In any event he is a former official of the ESO and the question of his coverage has nothing to do with CERN.

D. In his rejoinder the complainant submits that CERN may not use the ESO's decisions as a pretext for rejecting his claims since by doing so it is preventing the Pension Fund from exercising its decision-making authority.

The letter of 26 January 1995, which gave notice of the non-renewal of his appointment and which served as the basis of the impugned decision, is unlawful because it did not follow the recommendation of the Contract Advisory Committee of the ESO, was not substantiated and failed to give the required notice of one year. CERN must therefore acknowledge that the complainant was dismissed in breach of due process.

He submits that the Pension Fund properly acknowledged his partial incapacity but was wrong to grant him the *ex gratia* benefits. Though seemingly generous, that decision has only made things worse. It deprives him of basic rights such as medical insurance cover, the right of his widow to a pension and his right to have any worsening of his health taken into account. The ESO rejected his claims on the grounds that only the Pension Fund was competent and by that time it was too late for him to challenge the ESO's decisions.

Lastly, he objects to CERN's plea that his claim to medical insurance coverage is irreceivable.

He alters his conclusions. He asks that CERN should let him have medical insurance coverage "by part of its Participating Organization" and under an agreement concluded with the ESO.

E. In its surrejoinder the Organization presses its pleas about the lawfulness of the impugned decision and explains that the amount of the benefits granted to the complainant may be changed if his health declines.

CONSIDERATIONS

1. The complainant, like other staff of the European Southern Observatory (ESO), is a participant in the Pension Fund of the European Organization for Nuclear Research (CERN). The Fund is part of the legal structure of CERN and has no independent legal status. Any appeal by an ESO staff member against a decision by the Fund is directed, not to the ESO, but to CERN.

2. The complainant was appointed to the ESO on 1 September 1989. His first contract, which was for three years, was followed by another, also for three years, up to 31 August 1995. By a memorandum dated 6 January 1995 the head of Personnel notified to him the withholding of an annual step increase as from 1 January and by a letter of 26 January gave him notice that his contract would not be extended beyond 31 August 1995.

3. On 11 May 1994, while working at a computer screen at ESO, the complainant had felt sudden pain in his left eye. He suffered loss of vision which in the following months became permanent. Dr. Tobias Neuhahn, an ophthalmologist practising in Munich, made a provisional report on him on 22 November 1994. On 9 December 1994 the complainant forwarded that report to the Administration of the ESO with a covering

note referring to his "ascertained handicap". On 24 March 1995 Dr. Manfred Westhoff, another ophthalmologist of Munich, reported on his condition. On 6 June 1995 the complainant sent a memorandum to the head of Administration asking for the convening of the Rehabilitation Board and appending the provisional report by Dr. Neuhahn, the one by Dr. Westhoff and a final report dated 31 May 1995 by Dr. Neuhahn.

4. The Director General of the ESO accordingly convened the Rehabilitation Board, and it reported on 14 July 1995. It set at 39 per cent both the "degree of disability" and the loss of earning capacity - known as "unsuitability" - which the complainant had incurred while employed by the ESO. It concluded that his "condition cannot be classified as either occupational or professional". It held that he was "entitled to a pension for unsuitability" under Section 4 of Chapter II of the Rules of the Pension Fund of CERN. By a letter of 3 October 1995 the Pension Fund informed the complainant that he would accordingly receive an "unsuitability pension" of 485 Swiss francs a month as from September 1995.

5. On 13 December 1995 the complainant addressed to the chairman of the Governing Board of the Fund an internal appeal against the "decision" of 3 October claiming an "incapacity pension" instead. Having heard him in March 1996, the Board changed the decision to award him the unsuitability pension. It decided on 18 April 1996 to grant him instead, under Article III 1.01 of the Rules, "ex gratia benefits equal to a partial incapacity pension of 40%, retroactive from 1 September 1995". The amount of those benefits came to 2,141.50 Swiss francs a month in 1995 and to 2,178.75 in 1996. The Vice-chairman of the Board so informed him in a letter dated 7 May 1996, which he got on 12 June. In a letter of 17 June he asked for an explanation of the reasons for the decision, and the Vice-chairman gave it in a letter of 4 July 1996.

6. The complainant is challenging the Board's decision notified in its Vice-chairman's letter of 7 May 1996. In the complaint form he asks that the Tribunal:

"1. Quashes the CERN Pension Fund Governing Board (CPFGB) decision of 'ex gratia benefit equal to partial incapacity', granted to the complainant according to the Art.III.01 of the CERN Pension Fund (CERN-PF) Rules and Regulations ...;

2. Compels a new decision that clearly includes full legal, economical and financial applicability of the Chapter II Section I of the CERN-PF Rules and Regulations ...;

3. Orders to provide the complainant with a full health insurance since September 1, 1995 (date of his dismissal from ESO);

4. Orders the disclosure of any documentation concerning complainant's pension cases;

5. Orders a new decision that includes payment of a fair lump sum against all personal and moral injuries suffered by the complainant, inclusive his loss of earnings;

6. Awards the complainant DM 15,000 to cover his justifiable claim-expenses."

7. The complainant contends that he is entitled to an "incapacity pension" under Section 3 of Chapter II of the Fund's Rules. Article II 3.02 provides:

"A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension."

And Article II 3.03 says:

"A member who has been reclassified as a result of medically confirmed partial incapacity and who, as a consequence has his reference salary reduced, shall be entitled to a partial incapacity pension."

8. According to the complainant's account he was suffering, when recruited by the ESO in 1989, from mere "common myopia" that was "innate" and "stabilised". Dr. Westhoff, whom he then consulted, diagnosed an operable eye ailment and certified him to be fit for work. After further examination Dr. Westhoff referred him in June 1994 to Dr. Neuhahn. In his provisional report of 22 November 1994 - referred to in 3 above - Dr. Neuhahn said:

"It is certainly not working at the screen that caused your injury. Your myopia is innate. The bleeding in your left eye was more or less accidental and, as far as we can now tell, unforeseeable and so unpreventable ... Preventive measures are unknown ..."

The original reads:

"Die Bildschirmarbeit hat sicherlich nicht Ihre Krankheit verursacht. Ihre Kurzsichtigkeit ist angeboren, die Blutung am linken Auge mehr oder weniger schicksalschaft unde - soweit wir dies heute wissen - nicht vorhersehbar und dadurch auch nicht vermeidbar ... sind vorbeugende Maßnahmen nicht bekannt ..."

His conclusion was that the disability was probably irreparable.

9. The complainant sees the grant of *ex gratia* benefits as a pretext for the ESO's shirking its responsibility for "rehabilitation measures", i.e. keeping him on and guaranteeing proper medical treatment. He pleads a "clear legal presumption" that his is really a case of "'dismissal' following a medically ascertained and documented incapacity", whatever the ESO may have chosen to call it.

10. The letter that the head of Personnel of the ESO wrote to him on 26 January 1995 -- referred to in 2 above -- was explicit:

"On behalf of the Director General I regret to have to inform you that on the basis of the recommendation by the Contract Advisory Committee, it has been decided not to offer you an indefinite contract. ... your actual contract will come to its natural end and will not be renewed or extended beyond 31 August 1995."

The complainant did not appeal against that decision. It is therefore no longer open to him to plead that he was dismissed because of his disability and that the letter was not what it purported to be, namely, notice of non-renewal. So any claim he founds on such a plea must fail.

11. Article II 3.02 applies where a staff member is "dismissed on grounds of medically confirmed incapacity", and Article II 3.03 where he has been "reclassified as a result of medically confirmed partial incapacity". Having been neither "dismissed" nor "reclassified" because of "medically confirmed incapacity", the complainant is not entitled to payment of an incapacity pension under either of those provisions.

12. By its letter of 3 October 1995, referred to in 4 above, the CERN Pension Fund informed the complainant that ESO had instructed it to pay him an unsuitability pension. The ESO's decision was taken on the strength of the Rehabilitation Board's conclusions, which recommended the grant of such a pension under Section 4 of Chapter II of the Rules of the Fund. Article II 4.01 provides:

"Unsuitability is the reduction, presumed to be permanent or long-term, by at least in earning capacity resulting from a deterioration in physical or mental health, which occurred while the person concerned held a contract with one of the participating Organizations."

Article II 4.04 reads:

"Subject to the provisions of Article II 4.01 and Article II 4.02, a member shall be entitled to a pension for unsuitability upon leaving the employing organization for a reason other than resignation or dismissal owing to a disability confirmed by a medical certificate, or upon the occurrence of unsuitability the likelihood of which had been established in accordance with the provisions of Article II 4.02."

The Rehabilitation Board held that the unsuitability had been "incurred" while the complainant was under contract with the ESO. It was because he was to leave for a reason other than resignation or dismissal owing to a disability that the Rehabilitation Board concluded that he was entitled to a pension for unsuitability under Section 4.

13. By the impugned decision of 7 May 1996, however, the Governing Board awarded the complainant, instead of the unsuitability pension, "*ex gratia* benefits equivalent to a partial incapacity pension of 40%" which brought him a much higher income: 2,178.75 francs a month in 1996 as against only the 485 a month from the unsuitability pension.

14. The complainant's plea that the Governing Board of the Fund was not empowered to pay him the *ex gratia* benefit rests on his own interpretation of the provision under which it was acting. That provision was Article III 1.01, which reads:

"When on the death of a member or of a recipient of an incapacity pension, no one is entitled to a survivor's pension, *ex gratia* benefits may be granted to the spouse, descendants, parents, brothers and sisters and grandparents, if they are in need and they were financially dependent on the deceased at the time of his death. The Governing Board, when it deems it necessary on account of the financial situation of the person concerned, may grant *ex gratia* benefits in these or other very exceptional cases and after consultation

with the consulting actuary. The amount of such benefits shall be determined by the Governing Board. Should circumstances alter, the benefits may be increased, decreased or discontinued, according to the situation of the beneficiary."

The complainant submits that "ex gratia benefits" do not confer the same rights as does an "incapacity pension" but are intended mainly for what he calls "second line" heirs of a "pension beneficiary": they do not apply to someone, like himself, who is partly capable of work but was "dismissed", though "disabled".

15. CERN replies that the Governing Board may grant the *ex gratia* benefit in any "very exceptional" case, not just where the surviving dependants "of a member or of a recipient of an incapacity pension" are "in need".

16. CERN is right. The word "these" in the phrase "in these or other exceptional cases" in the second sentence of III 1.01 refers to financial dependants in need; so "other" must refer to cases outside that category which are "very exceptional". The Board therefore did have power to grant the *ex gratia* benefit to the complainant under the rule if, as it did, it came to the view, "after consultation with the consulting actuary", that his was a "very exceptional case". Besides, if his protest against the grant of *ex gratia* benefits were upheld he would have to fall back on the much lower unsuitability pension.

17. He argues further that by awarding him the *ex gratia* benefit the Board held him to be entitled to a partial incapacity pension. That is not so. The Board had already concluded, since he did not qualify under the Rules, that he was entitled to a pension neither for total nor for partial incapacity. It was prepared to grant him a pension for loss of earning capacity i.e. an "unsuitability pension"; but, having heard him, it decided as an exceptional measure to grant him instead *ex gratia* benefits equivalent to the "partial incapacity pension". Granting him the equivalent is not the same thing as actually awarding him such a pension.

18. The complainant's plea that the ESO did not provide him with any "rehabilitation measures" is immaterial to this case, which is about his entitlement to a pension from the Pension Fund of CERN. The ESO is not the defendant in this case.

19. The first of his claims -- set out in 6 above -- fails because, as was said in 10 above, he may not contend that he was dismissed. That being so, there is no need to order disclosure of any documentation, and his fourth claim must fail too. His third claim, to the provision of full health insurance, did not form part of his internal appeal and is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust his internal remedies. In any event the social security protection offered by the CERN Pension Fund to staff members of the ESO does not provide for health insurance.

20. In his rejoinder the complainant "cancels" his second and fifth claims. The Tribunal therefore need not entertain them.

21. His sixth claim, to an award of costs, fails because his main claims fail.

22. In his rejoinder he also says that the Organisation is wrong to argue in its reply that the ESO was told of the loss of vision in his left eye four months after he had had notice of the decision not to renew his contract. In support of that contention he produces a note on a compliment slip dated 9 December 1994 addressed to the Administration of the ESO and sent with Dr. Neuhahn's provisional report of 22 November 1994. That point is, however, immaterial to this case. What the complainant has appealed against is not the ESO's decision not to renew his appointment but the decision by the Pension Fund of CERN to award him the *ex gratia* benefit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

William Douglas

Mella Carroll

E. Razafindralambo

A.B. Gardner

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