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

SEVENTY-FOURTH SESSION

In re SCHICKEL-ZUBER

Judgment 1212

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Daria Schickel-Zuber against the European Organization for Nuclear Research (CERN) on 7 February 1992 and corrected on 13 March, the Organization's reply of 2 June, the complainant's rejoinder of 25 August and CERN's surrejoinder of 23 October 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rules II 6.01 e) and g) and Regulations R II 1.25, R II 6.05, R II 6.06.1 and R II 6.07 of the CERN Staff Rules and Regulations;

Having examined the written submissions and decided that hearings would serve no purpose;

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

A. The complainant, a French citizen born in 1952, joined CERN under a one-month appointment on 4 February 1991. On 26 February a selection board interviewed her for a post she had applied for as secretary to the Director-General at grade 6. After weighing her strengths and weaknesses it recommended her for the position with the rider that her qualifications should be reviewed during the probation period. On 1 March CERN granted her a three-year appointment on the post as from 4 March 1991. She was to be on probation until 3 August.

After collapsing on the Organization's premises on 26 April 1991 she was in hospital until 16 May. On 27 April her doctor put her on sick leave, which was to last for the rest of the year.

On 28 June 1991 the head of the Director-General's office and the Adviser to the Director-General wrote a report on her performance. The Director-General initialled it. It concluded that she was not right for the post. The Leader of the Personnel Division sent her a copy of it under cover of a letter of 2 July telling her that the Organization could not keep her on her post but offering to try her on another by extending her probation to 31 January 1992.

On 31 July 1991 CERN ordered her to report to its medical officer for a check-up. It did not send her his report.

In a letter of 12 November 1991, the decision she impugns, the Leader of the Personnel Division informed her on the Director-General's behalf that her appointment would end on 31 January 1992 under Rule II 6.01 e) and Regulations R II 6.05, R II 6.06.1 and R II 6.07 of the Staff Rules and Regulations. He explained that the extended probation she had been granted in the light of the report of 28 June afforded no grounds for taking a more favourable view of her and that Regulation II 1.25 barred further extension. She was to be kept on special leave with pay until 31 January 1992.

B. The complainant submits that the decision under challenge is flawed both in itself and because the report it is based on was improper.

She contends that the report was ultra vires inasmuch as the two reporting officers were not her "hierarchical superiors". Nor was she allowed any opportunity of commenting on it before it sealed her fate; so there was breach of due process too. Both Regulation R II 1.25 and the promise in the letter of 2 July 1991 from the Leader of the Personnel Division required that there should be several detailed reports about her before CERN decided whether to keep her on. It committed mistakes of law by acting in breach of both regulation and promise. By putting her on special leave with pay it was unable to keep that promise. It failed to realise that the grant of sick leave means suspending probation for the very reason that the staff member is unfit for work. Lastly, CERN misread the evidence and overlooked essential facts by basing its decision on nothing but the report of 28 June 1991. That report assesses, in debatable terms, her performance over a mere two months, the shortest period allowable under R II 1.25 being six.

The decision itself is in breach of due process because she was denied her right to a hearing. It also overlooked essential facts such as the Selection Board's recommendation that led to her appointment after one month on the job; her own efforts to adapt; the grave injury to her; and the bad, not to say inadmissible, conditions which she had to work in and which indeed led to her collapse on 26 April 1991.

She accuses CERN of abuse of process in following the procedure for dismissal of a probationer instead of the one provided for in cases of disability. By the same token it committed a mistake of law since it was free to dismiss her only under Rule II 6.01 g), not II 6.01 e).

Lastly, she alleges that the difficulties she had to face and the stress of the dispute drove her to an attempt at suicide on 6 February 1992. Her dismissal has left her with no income but a tiny unemployment allowance, which she gets for no more than 50 weeks, and with no hope of disability benefit even though she is a widow with three dependent children and not fit to work in the foreseeable future. If CERN had ended her appointment on the grounds of the medical finding of her disability she would have fared better: she would have had social security and pension benefits. Moreover, CERN could not have taken a decision until she had exhausted her leave entitlements and that might have given her time to show her mettle in new duties.

She asks the Tribunal to quash the impugned decision, order her reinstatement in her post or another suitable one or, failing that, award her suitable material damages, moral damages and costs.

C. In its reply CERN submits that her pleas are devoid of merit.

It denies breach of Regulation II 1.25 in making a single report on her performance during probation. What matters is that the record of a probationer's performance should be accurate. She challenges the report of 28 June 1991 as a whole and does not say which parts of it she objects to. In CERN's view it reflects faithfully the quality of her performance as a probationer and meets the conditions in Regulation II 1.25. Her allegation that the reporting officers were not her supervisors is equally groundless. Secretaries in the Director-General's office report to the Director-General and the head of the office. Since the head of the office and the Director-General's adviser signed the report and the Director-General himself initialled it, R II 1.25 was again complied with.

CERN rejects the complainant's contention that the reporting procedure must be adversarial: the Staff Rules and Regulations and the case law do not say so. That would deprive the Organization of its discretion and managerial prerogative. In any event the complainant's being on sick leave did not prevent her from commenting on the report since she was free to send in written comments if she so wished.

The report was made, not, as she says, less than two months, but twelve weeks after her appointment. That was quite long enough for evaluation, and there is no rule that requires the Organization to wait for six months. When a report duly records serious grounds for dismissing a probationer the Organization may do so under Rules II 6.01 and following of the Staff Rules.

CERN denies making her any promise. After the adverse report on her it first thought of dismissing her during the probationary period. Though it eventually decided to give her a second chance that was on the condition that her performance when she came back to work was up to standard. But it was the length of her leave and her failure to react to the Organization's offer which kept it from evaluating her during the extended probationary period and carrying out its proposal of 2 July 1991.

Regulation R II 1.25 provides for extensions only when "required by circumstances". But the serious circumstances of her case called for dismissal at the end of probation. She is wrong to think that sick leave entails suspension of probation, which neither the rules nor the case law require. That would give rise to abuse and set the Organization's discretionary authority at nought.

There is no merit in her plea that the real reason for dismissal was the state of her health. Her dismissal was based on the appraisal report which records her shortcomings at work.

There was no procedural flaw: CERN let a great deal of time pass - from 2 July 1991, when it sent her the report, to 12 November 1991, when it decided to dismiss her - in which she could have made her views known. She must pay the price of her failure to do so.

Her charge that it overlooked essential facts is groundless. It took due account of her domestic situation and granted her all the social protection that the Staff Rules and Regulations allowed: education grants for her children for the 1991-92 school year and a guarantee of standard unemployment benefits. Besides, she had been alerted to the demands that would be made on her as a secretary to the Director-General.

There was no misuse of authority. For one thing, the conditions laid down in the rules for dismissal during probation were met. It is immaterial whether, as she makes out, her illness was service-incurred. If that plea were upheld in the proceedings under way to decide the matter, that would affect only her entitlements, not the validity of dismissal. For another thing, the Organization did not deprive her of her right to sick leave under the Staff Regulations.

D. In her rejoinder the complainant repeats that those who wrote the report of 28 June 1991 were not competent to do so and that it was the working conditions in the Director-General's office that damaged her health. She cites the case of another secretary in that office who was dismissed owing to a service-incurred disability confirmed by medical certificate after a mere three weeks on the job.

She insists that CERN's decision to extend her probation amounted to a promise and that its failure to seek and obtain her comments before ending her appointment was in breach of its duty to give her a hearing.

She presses her objections to the impugned decision, observing in particular that if CERN wanted to dismiss her it was free to do so only on medical grounds. She would then have kept her livelihood. Someone who is on sick leave may be dismissed only for certified medical reasons, especially when suffering from chronic disability. Abiding by that rule was especially important in the complainant's case because, contrary to what CERN makes out, the conditions were not met for dismissing her at the end of probation for poor performance.

It does matter whether her illness is declared to be service-incurred: if CERN was liable for her work disability how can it have been right to dismiss her on the grounds of poor performance? That would make its misuse of authority even more blatant.

E. In its surrejoinder CERN submits that although the Director-General is in theory the immediate supervisor of his own secretariat, it is the head of his office that actually serves as administrative superior. So the complainant has no reason to challenge her reporting officers' authority. Her description of her working conditions sounds more like a quarrel with the Director-General than an objective account of the facts. The official she refers to was not in like case.

If she is right that she was safe from dismissal while on sick leave during probation CERN could not apply its rules on probation to her and she would enjoy undue privilege.

CONSIDERATIONS:

1. The complainant joined the staff of CERN on 4 February 1991 as a secretary in the Director-General's own office. On 1 March 1991 she was granted a fixed-term appointment for three years and in the first six months she was to be on probation.

On 26 April 1991 she collapsed at the office and was at once taken to hospital. Though she left hospital on 16 May she was not yet able to go back to work and was put on sick leave sine die.

By a letter of 2 July the Leader of the Personnel Division forwarded to her a probation report which the head of the Director-General's office and the adviser to the DirectorGeneral had signed on 28 June. He told her that she would be given new duties on return from sick leave; her probation was extended to 31 January 1992, when a decision would be taken on her future at CERN.

On 9 August 1991 she had a medical check-up by the medical officer.

On 15 November, while still on sick leave, she received a notice dated 12 November from the Leader of the Personnel Division on the Director-General's behalf of her dismissal at 31 January 1992 and of a decision to put her on special paid leave up to that date. That is the decision she is challenging.

2. This dispute is about the lawfulness of the decision to dismiss her while she was still on probation. The reasons

stated for it were her professional incompetence and shortcomings, and a decision taken on such grounds may be treated as serving the Organization's interests. Since the DirectorGeneral has discretion in the matter, his decision must stand unless it was taken without authority or in breach of a procedural or formal rule, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority or if some clearly mistaken conclusion was drawn from the evidence. What is more, in the case of termination of a probationary appointment the mistake or other flaw must be especially serious or glaring.

The complainant pleads almost all the flaws mentioned above, any of which would be fatal to the decision she impugns.

3. The first of her pleas the Tribunal will take up is that CERN acted in breach of her right to be heard before it decided to dismiss her.

The complainant is here relying on a rule for which there is a long line of precedents, examples being Judgments 987 (in re Baccache) and 1082 (in re Liégeois): the contract of employment creates a relationship of trust and that lays on the organisation a duty to inform the staff member of its intention of dismissing him and let him defend his interests. Moreover, it must disclose its intention before it gives notice; disclosing it just before the dismissal takes effect will not do.

4. The letter of 2 July 1991 forwarding the probation report to the complainant told her that because of the appraisal in it she could not be kept on in the Director-General's office but would be given new duties on return from sick leave. The letter went on:

"To allow for this second period of trial your probation, which is to end at 3 August 1991, is extended to 31 January 1992. In that further period there will be monthly reports on your performance and at the end of it a decision on your future at CERN."

The Organization could not have conveyed in more explicit terms its resolve to keep the complainant under contract. Yet on 12 November 1991 it dismissed her without telling her that it had changed its mind since 2 July 1991 or explaining why.

It thereby utterly disregarded her right to be given a prior hearing so that she might comment in detail on the reasons why she was being dismissed.

Her plea therefore succeeds.

5. The Organization submits that it let much time go by, from 2 July to 12 November 1991, and she was quite free in that period to state her point of view. She never did so and must bear the consequences of her own omission.

The plea fails. The complainant had neither a duty nor indeed any urgent reason to answer the letter of 2 July 1991. It did not end her appointment, but actually spoke of new duties. Not only must she have been pleased to hear of them but her express consent to them was not at all required. So there was nothing unreasonable about her failing to see the threat of dismissal.

Besides, the Organization changed its mind for no evident reason about giving her new duties and thereby failed to show good faith and due regard for her rights.

6. Since the foregoing grounds alone warrant quashing the impugned decision there is no need to entertain any of her other pleas.

7. Even though the usual period of probation has expired, the Tribunal will in the circumstances set the decision aside so that the proper procedure may be followed. She is reinstated in her contractual rights and shall be entitled to complete the probation period in some new assignment. If she cannot go back to work the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons.

In any event she is entitled to 10,000 Swiss francs in damages for moral injury and, since she succeeds, to 4,000 francs in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 12 November 1991 dismissing the complainant is quashed and her entitlements shall be determined accordingly, as set out in 7 above.

2. CERN shall pay her 10,000 Swiss francs in damages for moral injury.

3. It shall pay her 4,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, Vice-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 February 1993.

(Signed)

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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