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

NINETY-FOURTH SESSION

Judgment No. 2183

The Administrative Tribunal,

Considering the complaint filed by Mrs T. D.-N. against the European Organization for Nuclear Research (CERN) on 30 November 2001 and corrected on 25 January 2002, CERN's reply of 6 May, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 11 October 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant was born in 1944 and has Spanish and Dutch nationality. CERN recruited her in 1965 as a secretary in the Nuclear Physics Division on a fixed-term contract as a staff member, and in 1967 gave her an indefinite appointment. She resigned in 1972 for family reasons.

She states that in 1982 CERN gave her a ten-month contract, and that as from the end of 1983 she worked in the secretariat of the above-mentioned division and was paid "by claim", on the basis of claims for reimbursement. According to CERN, between 1982 and 1985 she was not an employee of the Organization but was paid "by claim" for various secretarial tasks she carried out for the Experimental Physics Division.

As from 15 October 1985 CERN granted her an appointment as an unpaid associate in that division to do secretarial work for a group known as the ISOLDE Collaboration. Like other such groups within CERN, the ISOLDE Collaboration is made up of several scientific institutions external to CERN, which carry out scientific experiments in association with CERN using the latter's facilities. The complainant's contract was drawn up on the basis of information from a registration form signed on 4 October 1985 and from a certificate of employment issued on 24 September 1985 by the *Junta de Energía Nuclear* (JEN), a scientific institute in Madrid. CERN renewed her contract every year and in the course of 1996 changed her appointment to one of "user", following the amendment of the categories of CERN's staff.

First internal appeal

By a letter of 1 September 2000 the complainant asked "to be treated officially, with retroactive effect from 15 October 1985, as an established staff member of CERN". She also claimed retroactive membership of the CERN Pension Fund, payment by CERN of "an adjusted contribution on all remuneration" received since 15 October 1985, and "compensation for the lack of a contract between 1983 and 1985". The Director of Administration rejected her claims in a letter of 26 October 2000. By a letter of 27 October 2000, the Leader of the Human Resources Division informed her that it had been discovered that, contrary to her assertion, she had not been employed by the JEN since 1985. Her appointment was to be "terminated" on 30 November 2000 in accordance with Staff Rule II 6.01(j), for "loss of one of the conditions for the granting of a contract of associated member of the personnel".

On 23 December 2000 the complainant filed an internal appeal against that decision. She sought the extension of her appointment until 30 September 2001, compensation "for the lack of social insurance coverage since 1 October 1983" and damages in respect of the injury caused by the accusation that she had made false statements.

Second internal appeal

From 12 May 2000 to 30 November 2000, when her user contract ended, the complainant was on sick leave.

On 28 June Mr R., who the Organization says is her supervisor, obtained permission to access her computer and e-mail accounts. On 29 June the complainant's husband, who also worked at CERN, met the Director of Administration to object to a violation of his wife's e-mail account. The complainant confirmed the objection in writing on 13 July. In a reply of 11 September the Director rejected the accusation of unlawful access. On 30 October the complainant challenged that rejection and claimed compensation for moral injury. Having examined the list of her incoming e-mails, on 20 November she declared that several private messages had been read while she was on sick leave. By a letter of 14 December 2000 the Director of Administration maintained his position and rejected her claim for compensation. On 25 January 2001 the complainant filed an internal appeal against that decision.

The Joint Advisory Appeals Board joined the two appeals and in its report of 27 July recommended rejection. By a letter of 31 August 2001, which is the impugned decision, the Director of Administration dismissed the appeals on the Director-General's behalf.

B. Regarding her first internal appeal, the complainant submits that the termination of her appointment was unwarranted: neither the JEN nor the institute that succeeded it informed her that she no longer had any link with them, so the link still existed.

She contends that it was CERN that paid her: the ISOLDE Collaboration made the actual payment but claimed it back from the Organization. From that she infers that her contract was wrongly designated as an unpaid associate's contract. In her view, it was in fact a paid associate's contract within the meaning of Article I 2.02 of the Staff Rules.

Pointing out that paid associates receive from CERN an amount which is intended to enable them to "build up a retirement pension", she submits that as the wife of a staff member insured by the Organization, she has sufficient social insurance coverage, at least for the purposes of Article R V 1.03 of the Staff Regulations[(1)]. However, she considers that this "indirect" cover does not insure her fully since "unemployment, retirement and in general the risks covered by the Swiss minimum social insurance are not taken into account".

She asks the Tribunal to quash the impugned decision, order CERN to extend her contract until 30 September 2001 and award her compensation for the lack of social insurance coverage as from 15 October 1985, damages for the injury caused by the false accusations and costs.

Regarding her second internal appeal, she points out that at the material time the only applicable rules were the Revised Rules for the Use of Computing Facilities at CERN, of 1 September 1991. Paragraph 4 of the section entitled "Account Codes, Passwords, Data and their Protection", states that:

"A computer user shall not engage in unauthorized access to other accounts or the data of other users."

She submits that although the rules are silent on the matter, the use of computer facilities for private purposes is tolerated. Consequently, Mr R. ought to have realised that he would come across private e-mails on accessing her account and that by opening them he was liable to breach of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted inter alia by the Social Division of the French Court of cassation. To avoid that risk, CERN ought to have contacted her - through her husband if necessary - so that she could take steps to protect the privacy of her mail.

She asks the Tribunal to quash the impugned decision, award her moral damages, order Mr R. to make her a formal apology and to award her costs.

C. In its reply CERN observes, with regard to the first internal appeal, that the complainant's contract as an unpaid associate was drawn up on the basis of her statement that she held an employment contract with the JEN. But her statement was false: the JEN had provided her with a fictitious certificate after Mr K., a group leader in the ISOLDE Collaboration, had intervened personally.

In CERN's view, the complainant has misconstrued Article R V 1.03 of the Staff Regulations in that she appears to

suggest that she no longer needed to have an employment relationship with an institution outside CERN. But it is plain from other articles of the Staff Regulations that an employment relationship with an outside institution and adequate social insurance are two requirements which apply cumulatively to users.

In subsidiary arguments CERN contends that the complainant has used her internal appeal and her complaint to submit two claims - compensation for lack of social insurance cover and redress for injury caused by false accusations - which are unrelated to the decision to terminate her contract, or indeed to any other decision of the Organization.

By signing a contract as an unpaid associate and then accepting her contractual position for almost 15 years with no objection, she has forfeited any claims she might have made in connection with her status. CERN denies that it paid her salary: on the instructions of the ISOLDE Collaboration, it made over her monthly salary by debiting the latter's account.

CERN points out that the sums it pays to paid associates "are intended solely to supplement the salary paid by the external institutions that employ them so that they have the means to live in the Geneva area where the cost of living is very high".

Regarding the second internal appeal, CERN contends that access to the complainant's computer account was warranted by the proper running of the ISOLDE Collaboration. After consideration of the complainant's interests and the inconvenience caused to the ISOLDE Collaboration, CERN is satisfied that it acted in conformity with the principle of proportionality. It did not contact the complainant because Mr R. had understood that she did not wish to be disturbed.

CERN observes that the 1991 Revised Rules provide, in paragraph 1 of the section entitled "Use in General", that: "The computing facilities, including networks, must not be used other than for their intended purpose in connection with the CERN official programme of work, unless subject to a special agreement". It confirms, however, that the use of a staff member's e-mail address for private purposes is tolerated. It follows, says CERN, that by using her professional e-mail address for private ends, and in the light of paragraph 4 of the above-mentioned 1991 Rules, under which authorised users may have access to other computer accounts, the complainant agreed, at least implicitly, that if there were some professional need the confidentiality of her private mail could be affected. For the same reason, there was no breach of the Convention for the Protection of Human Rights and Fundamental Freedoms.

D. In her rejoinder the complainant maintains, with regard to her first internal appeal, that she was employed by CERN and not by ISOLDE, and cites a statement made by the administration's representative before the Joint Advisory Appeals Board to the effect that "an experiment has no independent legal personality and so cannot hire anyone".

She argues that Mr K. acted on CERN's behalf so the Organization may not plead ignorance of his actions.

She maintains that she does have minimum social cover, being married to a permanent member of staff. In her view, provided that the cover exists, its source is of no import.

She affirms that it was only when she was gathering information to challenge the decision terminating her contract, that she found out that her salary was paid by CERN, and hence that she had paid associate status entitling her to social insurance coverage.

Regarding her second internal appeal, she submits that although she can quite believe that her absence was a nuisance for the Collaboration, she fails to see why CERN waited some six weeks before reacting, when it could have found a solution rapidly.

She rebuts CERN's assertion of professional necessity and denies accepting, in any form whatsoever, the principle of access to her electronic mail.

E. In its surrejoinder, as far as the first internal appeal is concerned, CERN refers to the arguments put forward in its reply.

Regarding the second internal appeal, it adds that, had he known that she would be away so long on sick leave, her

supervisor would have undoubtedly have taken the necessary steps. Since this was a professional matter, there was no call to involve the complainant's husband. It points out that the decision by the French Court of cassation has received criticism in France and, in support of its own position, cites a report by France's National Committee for the Protection of Personal Data.

CONSIDERATIONS

1. The complainant was employed by CERN from 20 September 1965 until 1 July 1972, when she resigned for family reasons. She resumed her career in 1982. Until 1985 she performed various tasks, paid on the basis of claims for reimbursement, in the secretariat of the Experimental Physics Division under the authority of Mr K., a permanent staff member of CERN and group leader of the ISOLDE Collaboration. The ISOLDE Collaboration is a group comprising several external scientific institutes and CERN itself which carries out experiments using CERN's facilities. Since the system of remuneration on the basis of claims had to be abandoned, on 25 June 1985 Mr K. sent the following memorandum to the main representatives of the ISOLDE Collaboration:

"Several years ago, we had a staff position for secretarial work at ISOLDE which was lost due to the economical [*sic*] situation at CERN. Since then we are paying the ISOLDE secretary out of the ISOLDE research budget 3156 which is given by EP to the ISOLDE Group Leader. The secretary is paid by a claim which is in principle illegal but general practice at CERN. It might happen that this mode of paying extra personnel will be stopped suddenly. Furthermore, the status of the secretary at CERN is rather undefined. You will not find the name in the telephone directory nor in the mailing office. In addition, this is a very unpleasant situation for the person concerned, since the working conditions are not clear, there is no contract, etc.

We have for the time being a very efficient secretary, [the complainant]. I would like to keep her. Therefore I tried to find a way to obtain for her a legal status at CERN. Since it is impossible to have the staff position back or to pay somebody for a longer period on '*régie*', I see the only possibility in the following procedure which I have discussed with people here at CERN:

[The complainant] has to have a status as Unpaid Associate at CERN. She will be paid by the Collaboration from the Collaboration Budget. EP should refund the money totally or partly to the Collaboration Budget by increasing its yearly contribution. So far so good. The 'only' problem is the status as Unpaid Associate. Some institute or institution has to put her on a post. In Italy, for example, there are posts without payment, so that an affiliation to an institution is existing without any financial consequences to the institution. Do you see in your country a similar possibility? I would like to ask you to look seriously into this problem because it might help us to avoid at a certain time in the future to be without secretarial help."

That same day, Mr K. attached this memorandum to a letter that he sent to the professor holding the chair of Atomic Physics at Complutense University in Madrid, asking him to consider whether a statement could be issued to say that the complainant, who had Spanish nationality, had "an affiliation" with the University.

2. On 24 September 1985 the Personnel Division Director at the nuclear energy institute (*Junta de Energía Nuclear* (JEN)) of the Spanish Industry and Energy Ministry sent Mr K. the following letter:

"I have been requested to write a letter to you in order to clarify the status of [the complainant] in connection with our Institute, *Junta de Energía Nuclear*, in Madrid.

I can inform you that she is in fact registered in our Personnel Record Sheets as having what we call an SP1 position. It basically means that she is not financially supported by us but belongs to a group of people which may participate in specific activities or projects of the Institute."

3. Following that "arrangement", on 21 October 1985 CERN offered the complainant a contract as an unpaid associate in the Experimental Physics Division with effect from 15 October 1985, stipulating that no salary would be paid to her and that the offer involved no financial commitment by CERN. This offer was made on the basis of a registration form signed by the complainant which indicated that she was employed as an "assistant SP1" at the JEN. On that form, the sum of 1,750 (probably expressed in Swiss francs) was mentioned under the heading "monthly salary", and "0530 ISOLDE" was indicated under the heading "name of the institute funding you".

4. For fifteen years no dispute arose out of this arrangement: on the basis of a one-year contract continuously renewed until 2000, the complainant received a salary, which was paid by the ISOLDE Collaboration but refunded to the latter by CERN's Experimental Physics Division as an operating expense, and adjusted in a manner similar to CERN staff members' salaries. The only legal modification that occurred during that period was the change, in 1996, from "unpaid associate" contract to "user" contract, which, like the former contract, implied that the complainant could show that she had an employment relationship with an external employer.

5. In 1998, according to the complainant, her conditions of work began to deteriorate. She was placed on sick leave with effect from May 2000. On 1 September 2000 she wrote to the Director-General of CERN complaining of the conditions under which she had been employed and asking for her situation to be rectified, that is to say "to be treated officially, with retroactive effect from 15 October 1985, as an established staff member of CERN", and to be granted "compensation for the lack of a contract between 1983 and 1985". This request prompted the administration to examine the complainant's administrative situation, whereupon it noticed that from the outset she could not have had an unpaid associate's contract because, contrary to the indications on the registration form she had signed, she had no external remuneration at all, let alone from the JEN.

On 26 October 2000 the Director of Administration replied that the contract she held complied with the Staff Rules and Regulations, but that when she had accepted the offer made to her in October 1985 she had falsely stated that she was employed and paid by the JEN. The fact that she had received from the ISOLDE Collaboration "financial benefits intended to compensate for the high costs of the Geneva area and calculated by alignment with the situation of CERN staff members" did not suffice to establish that she had been considered as a staff member and did not entitle her, under the applicable rules, to have that status. Consequently, the complainant's request for rectification of her situation was rejected, as was her request concerning the period from 1983 to 1985, which was considered to be time-barred. Lastly, the Director of Administration stated that the consequences of the clarification of her administrative situation at CERN would shortly be made known to her. On the very next day - 27 October 2000 - the Head of the Human Resources Division informed her of the "termination" of her contract on the grounds that she did not satisfy one of the conditions enabling her to have a "user" contract, namely the requirement of being bound by contract to an employer external to CERN: indeed, the Institute in Spain that succeeded the JEN had informed CERN that the complainant was not registered with it. The complainant did not return to work before her contract terminated on 30 November 2000.

6. Since the complainant was on sick leave from 12 May 2000 onwards, nobody could consult her e-mails. Her immediate supervisor asked for access to her computer account, consulted her e-mails and reported that he had separated the professional messages from the private messages, which had been stored in a new file. Having heard about what he described as an "e-mail violation", the complainant's husband, himself a CERN staff member, complained to the Director of Administration on 29 June, as did the complainant on 13 July, asking a number of questions to which the Director replied in a confidential letter of 11 September. The Director pointed out, in particular, that as a result of her absence, and in order that the Collaboration's work could continue, it had been necessary to deal with the e-mail messages she had received. The opening of those messages, under the circumstances, had been necessary; due procedure was complied with and access to the account had been frozen from 11 July 2000 onwards. The complainant was not satisfied with this reply and she disputed its content at some length in a letter of 30 October, in which she denounced the violation, opening and reading of her e-mails by her supervisor and by one of her colleagues, the destruction of professional files which she had not read, the destruction of "professional and semi-professional" files written in Dutch as well as further attempts to open her e-mail after her account had been frozen. Complaining of a very serious infringement of her personal rights, she requested compensation for the moral injury she had suffered. To this and other subsequent letters, the Director of Administration replied on 14 December 2000, clarifying certain issues and stating that he now considered the matter to be closed.

7. These two series of events led the complainant to lodge two internal appeals. In the first of these internal appeals, filed on 23 December 2000, she sought the annulment of the decision of 27 October 2000 terminating her user contract. She also sought an extension of her appointment until 30 September 2001, compensation for the lack of social insurance coverage since 1 October 1983 and damages in respect of the false accusations levelled at her. In her second internal appeal, filed on 25 January 2001, she challenged the decision conveyed in the letter of 14 December 2000 in which the Director of Administration considered the issue of the alleged violation of her e-mail to be closed. She claimed moral damages and requested that the employee who had taken the initiative of opening her e-mail be ordered to make her a formal apology.

8. The Joint Advisory Appeals Board, which heard these two internal appeals, examined them together during two sessions and issued a single recommendation dated 27 July 2001, which it submitted to the Director-General on 30 July 2001.

9. Regarding the first appeal, having dismissed as time-barred all claims concerning the complainant's employment from 1982 to 1985, the Board found that her situation since 1985 had been illegal. An employment relationship did in fact exist between the ISOLDE Collaboration and the complainant; she had worked, at CERN, for that Collaboration, which is part of the CERN programme, and she was paid by the Finance Division out of an ISOLDE account managed by CERN. The word "salary" appeared on the documents sent to that Division, and the complainant had no other employer. However, since the other conditions for the granting of an unpaid associate's contract were not satisfied, the Board recommended that her request for an extension of her contract should be rejected. It added that a legal opinion should be obtained to establish the identity of the complainant's *de facto* employer, since the latter owed the complainant social insurance coverage from 1985 to 2000. The Board regretted the circumstances in which the complainant's employment was ending and observed that it was vital "no longer to permit such arrangements for retaining staff for years, even though such arrangements may appear to satisfy both parties". It also expressed the wish that "the relevant documents of the file be submitted to internal audit".

10. On the second internal appeal, the Board recommended that the complainant's claims should be rejected, because her computer accounts registered at CERN were professional in nature and the procedures governing access to data contained in those accounts had been complied with.

11. By a decision of 31 August 2001, the Director of Administration rejected all of the complainant's claims, including her claim for social insurance coverage from 1 October 1983. Apart from the fact that this claim was based on a situation which had never been challenged, CERN considered that the situation resulted from the false statement made by the complainant in 1985, namely that she had an employment relationship with an external employer who had to provide her with social insurance coverage. Regarding the accessing of her computer account, the Director of Administration emphasised that he considered that this had been carried out in accordance with the applicable procedures, but he added that CERN regretted that she had "experienced as an invasion of [her] privacy what was merely an intervention required for professional reasons".

12. In the complaint before the Tribunal, the complainant seeks the annulment of the decision of 31 August 2001. On the basis of her first internal appeal, the complainant also asks the Tribunal to order CERN to extend her contract until 30 September 2001, to compensate her for the lack of social insurance coverage since 15 October 1985 and to pay her damages in respect of the false accusations levelled at her. On the basis of her second internal appeal, she seeks moral damages and a formal apology by the employee who opened her e-mail.

The decision of 27 October 2000 and the complainant's lack of social insurance coverage since 15 October 1985

13. In support of her claim for annulment of the decision of 27 October 2000 notifying her of the "termination" of her contract, the complainant refers to the arguments she put forward in her internal appeal of 23 December 2000. She considers that the Organization wrongly applied to her case the provisions of Article II 6.01(j) of the Staff Rules, which provides that appointments shall terminate on account of "the loss of one of the conditions for the granting of a contract of associated member of the personnel". According to the complainant, neither the JEN nor its successor informed her of the fact that she no longer had any connection with them. She considers that even though these institutes did not provide her with any social insurance coverage, she did not breach the provisions of Articles R II 1.12(c) and R V 1.03 of the Staff Regulations, which stipulate that associated members of the personnel must provide evidence of their social insurance coverage, and that if they do not have such coverage they are under a "strict obligation to safeguard themselves against the economic consequences of illness, accidents and disability". Indeed, as the wife of a CERN staff member she was covered by CERN's health insurance scheme and by its dependency insurance. Lastly, she complains of an atmosphere of harassment which in fact accounts for the decision to end her employment at CERN.

14. The Organization rebuts these arguments point by point and submits that it was obliged to end the complainant's contract since it had emerged that her unpaid associate's contract had been entered into on the basis of false statements and that the certificate provided by the JEN in 1985 was purely fictitious, having been produced in response to an entirely personal request by Mr K. of which CERN's administration had no knowledge. Furthermore, the fact that the complainant had social insurance coverage by virtue of her husband's status does not alter the fact

that she had no employment relationship with an external body. Lastly, no atmosphere of harassment has been found in the present case, in which CERN has simply put an end to an illegal situation.

15. The Tribunal shares CERN's view that the complainant's administrative situation since 1985 has been illegal, since it has been established that, contrary to the provisions defining the status of unpaid associates and subsequently that of "users", she did not in fact have any real employment relationship with an employer external to CERN. However, the complainant is far from being responsible for that situation: the circumstances in which she came to pursue her secretarial work for the ISOLDE Collaboration in 1985 show that the "arrangement" enabling her to be recruited as an unpaid associate who was in fact paid by the Collaboration was devised by her then supervisor, Mr K., a CERN staff member who wanted to continue to employ her. The Tribunal cannot endorse the argument put forward by CERN and reiterated in its surrejoinder, whereby "the steps taken by [Mr K.] of his own initiative and in the context of the ISOLDE Collaboration, without the authorisation of the administration and without informing it, can under no circumstances be attributed to [CERN]". International organisations must take responsibility for decisions of their employees, even if they subsequently condemn those decisions. Moreover, as early as 1985 CERN could easily have ascertained that the situation was illegal since, as mentioned earlier, the Personnel Division Director at the JEN had stated in his letter of 24 September 1985 that the complainant, as an "assistant SP1", was not financially supported by the Spanish institute. In addition, the registration form signed by the complainant, which CERN describes as containing false statements, merely indicated that with effect from 24 September 1985 the complainant held the position of "assistant SP1", as confirmed in the above-mentioned letter; under the heading "name of the institute funding you" it showed "0530 ISOLDE", which was the exact number of the ISOLDE Collaboration account, financed by the CERN, and used for many years to pay the complainant. It is difficult to explain the significance of the sum of 1,750 (Swiss francs?) shown on the registration form under the heading "monthly salary", but CERN itself acknowledges that both this entry and the words "0530 ISOLDE" were written in a different hand to the other information entered on the form in question and that there is some doubt as to the identity of their author. In any case, it has not been established that the complainant ever declared that she was receiving a salary of 1,750 Swiss francs from the JEN, which would of course have been in formal contradiction with the letter from the Personnel Division Director of the JEN.

Consequently, whilst the defendant Organization could not legally continue to employ the complainant under a user contract, since it had been established that she in fact had no contractual relationship with an external institute nor any external funding, the illegality of that situation, of which CERN could have been aware for a long time, stemmed from the desire of one of its staff members to retain the complainant as secretary of the ISOLDE Collaboration. Although the allegations of harassment are not supported by conclusive evidence, and although the fact that the complainant had the necessary social insurance cover via her husband has no bearing on the outcome of this dispute, the way in which the employment relationship of fifteen years' standing was ended cannot be justified. An extension of the complainant's contract under a different title is clearly impossible, since she does not satisfy the requirements for the granting of a user contract. However, in view of the role played by the Organization in perpetuating the complainant's illegal situation, the Tribunal considers that CERN should be ordered to pay her the sum of the net remuneration to which she would have been entitled had she remained in her functions until 30 September 2001.

The Tribunal does not, however, accept the complainant's claim for moral damages in respect of the allegations levelled at her regarding false statements, since the administration has clearly recognised that there is doubt as to the identity of the author of the disputed entries on the registration form.

16. Regarding her lack of social insurance cover since 15 October 1985, the complainant submits that her contract was incorrectly designated as an unpaid associate's contract, since it was in fact a paid associate's contract entitling her to a specific salary supplement designed to enable her to provide for her retirement. The Tribunal rejects her arguments on this issue. CERN's offer of 21 October 1985 to the complainant clearly stipulated that the Organization would provide no reimbursement of medical expenses; that these expenses could be covered by joining CERN's health insurance scheme at her own expense, but that this cover would not include disability or death; and that CERN assumed that the complainant was insured against these risks by her external institute. Having signed that contract, the complainant cannot seek to have it re-designated after the expiry of her appointment. Consequently, and without having to rule on the objection to receivability raised by the Organization - which considers that the claims submitted on this issue in both the internal appeal and the present complaint are not related to the decision to terminate her appointment or indeed to any other decision - the Tribunal dismisses the complainant's claim for reassessment of her entitlement to social insurance coverage since 1985.

The opening of the complainant's e-mails

17. The complainant argues that by reading her e-mail messages without her permission, Mr R., who contrary to the CERN's assertion was not her supervisor, and another of her colleagues infringed the privacy of her correspondence and breached not only the Revised Rules for the Use of Computing Facilities at CERN but also the general principles of law as expressed, in particular, by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to respect for private and family life.

18. CERN retorts that Mr R. was still the complainant's supervisor when, in view of the needs of the department, he asked for access to the complainant's computer account. It considers that the operation of the Organization could be compromised were it not able to intervene in urgent circumstances. E-mail correspondence at work must, in principle, be professional in nature. Despite the instructions given to her, the complainant had not created separate folders for sorting incoming mail according to its specific nature. Furthermore, the principle of confidentiality of correspondence, which CERN observes regardless of the fact that it is not bound by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, cannot prevent the infringement, for professional reasons, of the confidentiality of private correspondence which may be stored in a computer provided for professional use. CERN adds that if the confidentiality of her private e-mail messages was of paramount importance to her, "she ought to have resorted to setting up an independent e-mail account at her own expense".

19. The Tribunal shall first reiterate the principles applicable to this case.

Firstly, the CERN rules which applied at the relevant time were those of the Revised Rules for the Use of Computing Facilities at CERN, dated 1 September 1991, which clearly indicate, in paragraph 4 of the section entitled "Account Codes, Passwords, Data and their Protection", that:

"A computer user shall not engage in unauthorized access to other accounts or the data of other users."

In paragraph 1 of the section entitled "Use in General", the Rules provide, in particular, that:

"The computing facilities, including networks, must not be used other than for their intended purpose in connection with the CERN official programme of work, unless subject to a special agreement."

However, CERN acknowledges that, like other organisations, it tolerates the use of e-mail addresses for private purposes within appropriate limits, and "provided that this does not adversely affect the operation of the Organization".

Secondly, the principle of the confidentiality of private messages stored in a professional e-mail account must be observed.

Thirdly, in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organisations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care.

20. It must therefore be determined whether the access to the e-mail account, which in principle was intended for professional use but which contained personal messages, complied with the applicable regulations and with the above-mentioned principles. On this issue the Tribunal notes that, contrary to the complainant's assertion, Mr R. was indeed her supervisor at the material time, and that he made an official request to the appropriate division on 28 June 2000 for access to the complainant's computer account, as she had been on sick leave since 12 May 2000. It has also been established that the complainant's e-mail address was frequently used on behalf of the ISOLDE Collaboration and that a large number of work-related messages were pending in her absence. It would have been both desirable and possible to contact the complainant before opening her e-mail account, and it is certainly regrettable this was not done, but it would appear that instructions had been given not to contact employees on sick leave in connection with work matters. It is even more regrettable that numerous messages, mostly work-related, were deleted. However, there appears to have been no actual breach of the confidentiality principles which had to be observed. The complainant's request that Mr R. be ordered to present an apology must be rejected, since such injunctions cannot be issued by the Tribunal, which nevertheless wishes to emphasise that in the letter of 31 August 2001 from the Director of Administration, the Organization regretted that the complainant had "experienced as an invasion of [her] privacy what was merely an intervention required for professional reasons".

Regarding costs

21. Since the complainant's pleas succeed in part, she is entitled to an award of costs, which the Tribunal sets at 2,000 Swiss francs.

DECISION

For the above reasons,

1. CERN shall pay the complainant an amount equal to the net remuneration to which she would have been entitled had she remained in her functions until 30 September 2001.

2. It shall pay her 2,000 Swiss francs in costs.

3. The complainant's other claims are rejected.

In witness of this judgment, adopted on 13 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Article R V 1.03 reads:

"Associated members of the personnel who are not entitled to social insurance coverage provided by their home institution shall be under the strict obligation to take the necessary measures to safeguard themselves and the members of their family against the economic consequences of illness, accidents and disability. They may join, on a voluntary basis, the health insurance scheme stipulated in Article R V 1.01."

Updated by PFR. Approved by CC. Last update: 13 February 2003.