

**NINETY-EIGHTH SESSION**

**Judgment No. 2380**

The Administrative Tribunal,

Considering the second complaint filed by Mrs T. D.-N. against the European Organization for Nuclear Research (CERN) on 15 August 2003, CERN's reply of 9 February 2004, the complainant's rejoinder of 26 March and the Organization's surrejoinder of 4 June 2004;

Considering Articles II, paragraph 5, and VII 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 facts of this case are to a large extent identical to those set out in Judgment 2183, delivered on 3 February 2003, concerning the complainant's first complaint. In that judgment the Tribunal ordered CERN to pay the complainant an amount equal to the net remuneration to which she would have been entitled had she remained in service until 30 September 2001, as well as costs, but rejected her other claims. On 3 April 2003 CERN paid her 36,364 Swiss francs.

In a letter to the Director-General dated 24 April 2003 the complainant, referring to Article 21 of the Agreement of 11 June 1955 between the Swiss Federal Council and CERN concerning the legal status of the Organization in Switzerland, claimed the payment of the adjusted contribution that CERN should have paid to the Pension Fund on all the remuneration she had received between 15 October 1983 and 30 September 2001, amounting to 387,000 francs. In a letter dated 23 May 2003 the Director of Administration, on behalf of the Director-General, replied to the complainant that her claim for compensation for the lack of social insurance coverage since 1 October 1983 had already been rejected following her internal appeal of 23 December 2000; that her claim for compensation for the lack of social insurance coverage since 15 October 1985, submitted with her first complaint, had been dismissed by the Tribunal on the grounds that she had accepted her contractual status in full knowledge of the facts; and that, with regard to the period from 1 October 1983 to 15 October 1985, the grounds on which the Tribunal had dismissed the latter claim applied by analogy. That is the impugned decision.

B. The complainant recalls that the Tribunal, in Judgment 2183, after noting that her contract with CERN of 21 October 1985 was based on an "arrangement", found that she was "far from being responsible for that situation". She contends that when the contract in question was drawn up, and despite the fact that the defendant maintains that it presumed that her social insurance coverage was provided by her home institution, CERN was aware that the terms of the contract "were not being observed". According to her, the Spanish laboratory had already warned CERN in a letter of 25 August 1985 that the complainant had no social insurance coverage. The statements made in the contract were therefore intended solely as a means of releasing the Organization from its obligations; consequently, the contract must be deemed null and void.

The complainant emphasises that, since the Tribunal considered that she did not satisfy the requirements for a user contract, the terms of her employment with CERN could not be those of either a user or an associate. And yet, she points out, she enjoyed a continuous employment relationship for more than 18 years, and from October 1983 to September 2001 she had a "tacit, unwritten contract" with the Organization.

She recalls that the Joint Advisory Appeals Board concluded in 2001 that her employer owed her social insurance coverage.

The complainant maintains that, according to Judgment 2183, firstly CERN was her employer for the whole of the above-mentioned period and secondly she could not consider herself as a paid associate, as an unpaid associate nor as a user. Under its rules, however, CERN is bound to provide social insurance coverage for its staff, while Article 21 of the Agreement of 11 June 1955 stipulates that "[t]he Organization is exempt from all compulsory

contributions to general social insurance funds such as equalization, unemployment insurance and workmen's compensation funds, etc., it being understood that the Organization will so far as possible and under conditions to be agreed upon insure with Swiss social insurance funds those of its agents who are not assured of equivalent social protection by the Organization itself". The complainant concludes that the Organization cannot escape from its legal obligations and that, since she worked for CERN for 25 years, the Organization should pay her "compensation for old age protection".

The complainant asks the Tribunal to quash the impugned decision and to order CERN to pay her compensation equivalent to the amount it should have paid in to the Pension Fund, adjusted for all remuneration received between 15 October 1983 and 30 September 2001, amounting to 387,000 francs, and costs.

C. In its reply CERN contends that the complaint as a whole is irreceivable for two reasons, the principal one being that the impugned decision is purely confirmative, because in its letter of 31 August 2001 CERN had already informed the complainant of its decision to dismiss all the claims of her internal appeal, including that for social insurance coverage since 1 October 1983, and it has taken no new decision on the matter. It points out that in her first complaint the complainant claimed compensation for the lack of social insurance coverage as from 15 October 1985. In so doing, she forfeited her right of appeal with regard to the period 1 October 1983 to 15 October 1985. Subsidiarily, CERN contends that, should the letter of 23 May 2003 be deemed to be an impugnable decision, the complaint would be irreceivable for failure to exhaust internal remedies.

CERN raises further objections to receivability regarding the complainant's claim concerning the period 15 October 1985 to 30 September 2001. By virtue of Judgment 2183, the matter is *res judicata*. Moreover, should the complaint be considered as an application for review of that judgment, it should be dismissed by the Tribunal, since putting forward a new plea – in this case the one based on Article 21 of the Agreement of 11 June 1955 – does not constitute an admissible ground for review.

On the merits, and very subsidiarily, CERN argues that the above-mentioned Agreement is an international treaty between the Organization and Switzerland, which gives rise to rights and obligations only between the contracting parties. It does not confer any direct rights on third parties.

According to the defendant, it is clear from current rules that the Organization is directly responsible for the social insurance coverage of staff members and assimilated members of the personnel (MPE) alone. The coverage of associated members of the personnel (MPA) remains the responsibility of their employer. Thus, according to Regulation R V 1.01, membership of CERN's Pension Fund applies only to the MPE category, while according to Regulation R V 1.03 MPA category staff "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 arrange for their own social insurance coverage. The complainant's unpaid associate contract was renewed annually and in 1996 was changed into a user contract, in line with the newly denominated categories of staff members. This means that it would have been contrary to the Organization's rules for the complainant, who was under an MPA contract (initially as an unpaid associate and then as a user), to have joined the Pension Fund.

CERN submits that the complainant's real objective is to have her contractual relationship with the Organization re-designated, which would not be compatible with Judgment 2183.

Lastly, referring to former Regulation R VIII 1.01 and Regulation R IV 1.59, CERN contends that the complainant's claim for financial compensation relating to a period going back almost 20 years – from 15 October 1983 to 15 October 1985 – is in any case time-barred.

D. In her rejoinder the complainant points out that, since the Tribunal stated in Judgment 2183 that she could not claim compensation for the lack of social insurance coverage as a paid associate on the grounds that she could not seek to have her contract re-designated, she could not be considered either as a paid associate or as an unpaid associate, since the contract of 15 October 1985 was merely "a simulation". When this contract was drawn up, CERN must have been aware that it was not in a position to fulfil its terms, so that the contract must be considered null and void. She accuses CERN of trying to create confusion as to the true nature of her second complaint. She denies that she ever intended to contest Judgment 2183 and reiterates that what she is seeking is the application of the terms of the Agreement of 11 June 1955. She argues that her employment relationship with CERN is "atypical" and that what she wants is not "compensation" as a staff member, starting in October 1985, but entitlement as from 1 October 1983 to the social insurance coverage provided for in the said Agreement. She denies CERN's allegation

that she is attempting to have her contractual relationship re-designated.

Lastly, she contests the defendant's assertion that the contract of 15 October 1985 was renewed annually and maintains that she was never personally informed of the changes of personnel categories introduced in 1996.

E. In its surrejoinder CERN submits that the complainant's reasoning is puzzlingly disconnected from the purpose of the complaint, insofar as she argues that her contract is null and void because it cannot be re-designated and then reaches the conclusion that her employment relationship with CERN began on 1 October 1983. Apart from the fact that the complainant's unpaid associate contract implied no employment relationship with the Organization, and hence no responsibility for social insurance coverage on the part of the latter, it is hard to see how such responsibility could arise from the alleged absence of a contract.

## CONSIDERATIONS

1. In Judgment 2183 delivered on 3 February 2003 the Tribunal gave a ruling on the complainant's first complaint, in which she sought the annulment of the CERN authorities' decision of 27 October 2000 terminating her user contract. The complainant had also asked the Tribunal to order CERN to extend her contract until 30 September 2001, to award her compensation for the lack of social insurance coverage as from 15 October 1985 and damages for the injury she considered she had suffered. For the reasons given in Judgment 2183, the Tribunal found that the complainant had been in an illegal situation which the defendant had been partly responsible for originating and perpetuating, and ordered CERN to pay her an amount equal to the net remuneration to which she would have been entitled had she remained in her functions until 30 September 2001. On the other hand, the Tribunal dismissed the complainant's other claims, on the grounds in particular that, having accepted CERN's offer of contract in 1985 indicating that she could join its health insurance scheme – subject to the proviso that the scheme would cover only medical expenses – she could not seek to have her contract retroactively re-designated, and that her claim for reassessment of her “entitlement to social insurance coverage” since 1985 was unfounded.

2. Having obtained execution on 3 April 2003 of the part of the judgment that was in her favour, the complainant wrote to the Director-General on 24 April 2003 claiming the payment of the adjusted contribution that CERN should have paid in to the Pension Fund on all the remuneration she had received from 15 October 1983 to 30 September 2001. In support of her claim she referred to the provisions of Article 21 of the Agreement of 11 June 1955 between the Organization and the Swiss Federal Council. The Director of Administration, on behalf of the Director-General, rejected this claim on 23 May 2003, reminding the complainant that in December 2000 she had already lodged a claim for compensation “for the lack of social insurance coverage since 1 October 1983”, that this claim had been dismissed and that the Tribunal, in a judgment carrying the authority of *res judicata*, had also dismissed her claim for reassessment of her entitlement to social insurance coverage since 1985.

3. The complainant asks the Tribunal to quash the decision of 23 May 2003 and to order CERN to pay her compensation equivalent to the adjusted amount that the Organization should have paid in to the Pension Fund on all the remuneration received between 15 October 1983 and 30 September 2001, which amounted to 387,000 Swiss francs. She contends that, since CERN was her employer as from October 1983, it should have insured her with a pension fund in accordance with the terms of the above-mentioned Agreement, which stipulates in Article 21 that:

“The Organization is exempt from all compulsory contributions to general social insurance funds such as equalization, unemployment insurance and workmen's compensation funds, etc., it being understood that the Organization will so far as possible and under conditions to be agreed upon insure with Swiss social insurance funds those of its agents who are not assured of equivalent social protection by the Organization itself.”

4. In rebuttal, the defendant raises several objections to receivability: it maintains that the impugned decision, which is dated 23 May 2003, is merely a confirmation of the decision of 31 August 2001 rejecting all the claims contained in the complainant's internal appeal, including those seeking to obtain compensation for “the lack of social insurance coverage since 1 October 1983”. Consequently, the decision taken in 2003 could not, according to the Tribunal's case law, have triggered a new time limit for appeal. Even if that decision is not considered as confirmative, the complainant should have lodged an internal appeal against it instead of appealing directly to the Tribunal. In fact, the claims submitted in the second complaint are the same as those submitted in the complaint leading to Judgment 2183, so that the complainant's claims must be interpreted either as challenging *res judicata*, or conceivably as an application for review which would be irreceivable.

5. On this last point, the defendant's arguments cannot stand: the *res judicata* rule may be pleaded and applied only on condition that the parties, the purpose of the suit and the cause of action are the same (see for instance Judgment 1216). In the case in hand, while it is true that the same party has filed a complaint with the same purpose as the one that was dismissed earlier, the cause of action, namely CERN's breach of the Agreement of 11 June 1955, is new and did not constitute the legal basis for the claims previously submitted to the Tribunal, as the defendant recognises. The *res judicata* argument is therefore in this respect devoid of merit.

6. On the other hand, it is true that the administrative decision of 31 August 2001 expressly rejected the internal appeal filed by the complainant on 23 December 2000 with a view to obtaining compensation for "the lack of social insurance coverage since 1 October 1983". When the Organization, following Judgment 2183, received a request for the application of Article 21 of the Agreement of 11 June 1955, it could conceivably have reopened the case and taken a new decision. The complainant, however, had already relied on that Article in her internal appeal, which met with a final rejection. In the circumstances, the defendant is right in arguing that the impugned decision in that respect is merely a confirmation of CERN's earlier decision to reject her claim, which was not quashed by the Tribunal.

7. Since the complaint is irreceivable, the Tribunal dismisses it without ruling on the plea based on the breach of Article 21 of the Agreement of 11 June 1955, which in any case did not entitle the complainant to any benefit.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet