Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**O.-E.**

***v.***

**CERN**

**126th Session** **Judgment No. 3994**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. O.-E. against the European Organization for Nuclear Research (CERN) on 25 January 2017, CERN's reply of 8 May, the complainant's rejoinder of 13 July, corrected on 26 July, and CERN's surrejoinder of 25 October 2017;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges CERN's refusal to recognise the illness from which she says she suffers as occupational.

The complainant, who joined CERN in 1998 and had held an indefinite contract since 1 June 2006, was placed on sick leave from June 2012. On 22 November 2013, on the basis of a medical certificate, she asserted that she was suffering from electromagnetic hypersensitivity and requested that this condition be recognised as an occupational illness within the meaning of Administrative Circular No. 14 (Rev. 3). The Human Resources Department pointed out that this condition "[was] not a diagnosis recognised by the medical profession" and that another doctor, who had examined her in February 2013 at the request of CERN's Consulting Medical Practitioner, had arrived at a different

diagnosis. Pursuant to Title VI of the aforementioned circular, the complainant was invited to designate a doctor to establish a diagnosis in agreement with CERN's Consulting Medical Practitioner. Since these two doctors were unable to come to an agreement or to appoint a joint expert, in July 2014 the Human Resources Department appointed Professor B. to provide a final opinion on the diagnosis. Professor B. concluded that the condition from which the complainant alleged she suffered was not regarded by the medical community as a condition with clear diagnostic criteria and that she had somatic symptom disorders. The Director-General accepted that conclusion on 16 December 2014, thereby allowing the procedure for recognising a potential occupational illness, which had been suspended pending that diagnosis, to be resumed. On 18 December 2015 the complainant was informed that since the cause of her symptoms had not been established, they could not be considered occupational.

On 3 March 2016 the complainant lodged an internal appeal against that decision. She principally asked for the decision to be revoked and for her "illness" to be recognised as occupational. The Joint Advisory Appeals Board delivered its opinion on 21 October 2016 after it had heard the complainant and several doctors. It stated that only Professor B.'s diagnosis could "serve as a basis" for determining whether to recognise the illness as occupational, and it considered that the procedure culminating in the decision of 18 December 2015 was lawful. The Board noted that there was disagreement between medical specialists, in particular regarding "technical medical points", but emphasised that the idiopathic nature (that is, for which the cause is unknown) of the somatic disorders had been clearly stated. It therefore concluded that it was plainly not possible for those disorders to be occupational and hence recommended that the internal appeal be dismissed. On 26 October 2016 the complainant was informed of the Director-General's decision to endorse that recommendation and to maintain the decision of 18 December 2015. That is the impugned decision.

In the meantime, on 26 May 2016 the Director-General had advised the complainant that she had decided to recognise her total disability, as a result of which her contract was terminated as of 30 November 2016.

The complainant requests the Tribunal to set aside the decision of 26 October 2016, to find that the illness from which she says she suffers is occupational and to order CERN to take all necessary measures to enable her to receive the disability benefits to which she would be entitled as a result of that finding. She also claims costs for both the internal proceedings and the proceedings before the Tribunal, assessed at 47,000 Swiss francs and 10,000 Swiss francs, respectively.

CERN contends that the complaint is irreceivable *ratione temporis* and *materiae* to the extent that the complainant implicitly seeks to challenge Professor B.'s final opinion. It submits that in all other respects the complaint should be dismissed as unfounded.

## CONSIDERATIONS

1. Following a procedure for recognising a potential occupational illness, on 18 December 2015 the complainant, who had been examined by an expert appointed to give a final opinion on the diagnosis of the illness from which she suffered, was informed that since the cause of her symptoms had not been established, they could not be considered occupational.

In her complaint, the complainant asks the Tribunal to set aside the decision of 26 October 2016 upholding the decision of 18 December 2015, to find that the illness from which she says she suffers is occupational and to order CERN to take all necessary measures to enable her to receive the disability benefits which would result from that finding. She also seeks an award of 47,000 Swiss francs for the costs arising from the internal proceedings as well as 10,000 Swiss francs for her costs before the Tribunal.

2. CERN contends that the complaint is irreceivable insofar as the complainant seeks to challenge Professor B.'s final opinion. However, the file shows that while the complainant questions the justification for the expert's final opinion in support of her criticism of the refusal to recognise her illness as occupational, none of her claims

is directed against that opinion. Accordingly, the Organization's objection to receivability must be dismissed.

3. In her complaint, the complainant challenges CERN's refusal to recognise the illness from which she says she suffers as occupational.

CERN maintains that the procedure followed in this case was conducted in compliance with the applicable rules and the principles established by the Tribunal. It submits that the complaint should be dismissed as unfounded.

4. The complainant endeavours to show that she suffers from electromagnetic hypersensitivity which is, in her view, occupational. She points out that the fact that her illness has no known cause does not mean it has no possible cause. She adds that while there is no scientific consensus on the link between electromagnetic waves and her health problems, she has provided proof of such a link in her case.

CERN submits that the complainant has somatic symptom disorders, as the expert found following a lawful procedure, and that this is a final, independent diagnosis which can no longer be challenged. It adds that scientific opinions on the existence of electromagnetic hypersensitivity, from which the complainant says she suffers, are unusual and in the minority.

CERN also submits that the complainant has not proved any link between her illness and her working environment.

5. The Tribunal recalls that according to consistent precedent, it may not replace the medical findings of medical experts with its own assessment. However, it does have full competence to say whether there was due process and to examine whether the medical reports on which administrative decisions are based show any material mistake or inconsistency, overlook some essential fact or plainly misread the evidence (see, for example, Judgment 1284, under 4).

6. The evidence shows that the expert appointed to provide a final opinion on the diagnosis of the illness from which the complainant suffered examined her on 22 August 2014. He was also able to consult her medical file, which was made available to him by CERN. In his report, the expert noted that a doctor who had examined the complainant had determined, on the basis of paraclinical investigations, that she was affected by electromagnetic hypersensitivity. However, the expert observed that this syndrome was not regarded by the medical community as a condition with clear diagnostic criteria and concluded that the complainant did not have such a condition but a set of idiopathic symptoms or, more specifically, "somatic symptom disorders".

The complainant has produced no evidence in support of her claims that challenges either the lawfulness of the procedure followed during that expert assessment or the soundness of the expert's conclusions.

7. The complainant alleges that CERN did not fulfil its duty of protection. She states that CERN refused to implement "structural and organisational measures" which she had proposed with a view to limiting her exposure to electromagnetic fields, such as deactivating the Wi-Fi hotspot close to her office, painting her office walls with insulating paint, providing her with an office with concrete walls or setting up a system of working from home.

The Organization counters that it did everything possible to understand the causes of the complainant's symptoms. It adds that its attention and flexibility were reflected in its efforts to "respond to the complainant's concerns" and in the fact that it granted several of her "unusual" requests, in particular during a hearing before the Joint Advisory Appeals Board.

8. While the Tribunal's case law obliges international organisations to take appropriate measures to protect their officials' health and safety (see Judgment 3689, under 5; see also Judgments 3025, under 2, and 2706, under 5), the measures requested must be reasonable and based on objective evidence of their necessity. In the present case, the Tribunal considers that some of the measures requested by the

complainant, in particular moving her into an office with concrete walls and deactivating the Wi-Fi hotspot for a whole sector, represented an excessive burden on CERN's resources. Furthermore, the file shows that the Organization had granted some of the complainant's wishes, such as authorising her to change office and to work from home as of 11 January 2012.

This plea must therefore be dismissed.

9. The complainant also alleges that CERN violated due process. She explains that her medical file was partly disclosed to her only after her lawyers intervened. She adds that her right to be heard was violated since the Joint Advisory Appeals Board did not allow her to be assisted by her lawyer during the hearing. Lastly, she considers that the Director-General endorsed the Board's recommendation without any type of "further questioning".

10. Concerning access to the medical file, the Tribunal recalls that, "while there may be some cases in which it is not advisable to allow staff members to have full access to their medical file at a particular point in time (and the decision to deny access temporarily must be fully justified and reasonable), the right to transparency as well as the general principle of an individual's right to access personal data concerning him or her mean that a staff member must be allowed full and unfettered access to his or her medical file and be provided with copies of the full file when requested (paying the associated costs as necessary)" (see Judgment 3120, under 7).

In the present case, CERN does not say why it allowed the complainant only partial access to her medical file. Accordingly, the Organization breached its duty of transparency. In the circumstances, the Tribunal does not consider it appropriate to set aside the impugned decision on that ground alone. However, pursuant to Article VIII of its Statute, it will award the complainant moral damages in the amount of 5,000 Swiss francs for the injury caused.

11. Regarding the alleged breach of the right to be heard, Article R VI 1.16 b) of the Staff Regulations, which deals with hearings before the Joint Advisory Appeals Board, states that during hearings:

> "[T]he member of the personnel having lodged the internal appeal may be assisted, or in the event of force majeure represented, by a member or former member of the personnel. The Chairman shall notify him [or her] of this right beforehand in writing."

This provision implicitly intends to prevent an official from being assisted or represented by a person other than a member or former member of the personnel, in particular by a lawyer. The Joint Advisory Appeals Board simply applied this provision when it refused to allow the complainant to be assisted by a lawyer during the hearing. Moreover, since the complainant still had the option of being assisted by a member or former member of the personnel, the Board did not breach the complainant's right to be heard.

The plea must therefore be dismissed.

12. The Tribunal recalls, moreover, that when the executive head of an organisation adopts the recommendations of an internal appeal body, she or he is under no obligation to give any further reasons in his or her decision than those given by the appeal body itself (see Judgment 2092, under 10).

In this case, the Director-General followed the recommendation of the Joint Advisory Appeals Board. In accordance with the principle cited above, she was not obliged to engage in any "further questioning", despite what the complainant maintains. This plea must therefore be dismissed.

13. As she succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 3,000 Swiss francs.

DECISION

For the above reasons,

1. CERN shall pay the complainant moral damages in the amount of 5,000 Swiss francs.
2. It shall also pay her costs in the amount of 3,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 3 May 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

*(Signed)*

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ