

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

T. F. (Nos. 3 and 4)

v.

CERN

138th Session

Judgment No. 4905

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. T. F. against the European Organization for Nuclear Research (CERN) on 23 November 2021 and corrected on 26 November, 29 November and 6 December 2021 and 20 January 2022, CERN's reply of 1 April 2022, the complainant's rejoinder of 3 May 2022 and CERN's surrejoinder of 4 July 2022;

Considering the fourth complaint filed by Mr J. T. F. against CERN on 1 March 2023, CERN's reply of 10 May 2023, the complainant's rejoinder of 10 June 2023 and the Organization's surrejoinder of 6 September 2023;

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 cases may be summed up as follows:

The complainant challenges the decision to set the rate of deterioration of physical health resulting from an occupational accident at only 15 per cent and, consequently, to award him the sum of 11,874.60 Swiss francs as an indemnity for deterioration of physical health.

The facts of the case have already been set out at length in a previous complaint by the complainant which led to Judgment 4904, also delivered in public this day.

Suffice it to add that, by a letter of 21 April 2021, the Director-General informed the complainant of her decision to follow the recommendation of the Joint Advisory Rehabilitation and Disability Board (JARDB) not to recognise that he was suffering from a disability. The decision, which in that respect was the subject of the aforementioned judgment, also announced that, as one of the members of the panel of doctors had “established a 15% deterioration of physical or mental health”, the Director-General had asked the Human Resources Department (hereinafter “the HR Department”) “to contact [the complainant] as soon as possible to explain to [him] the procedure set out in Annex 3 [to Administrative Circular No. 14 (Rev. 4) concerning the ‘Protection of members of the personnel against the financial consequences of illness, accident and incapacity for work’ (hereinafter ‘AC 14’)]”.

By a letter of 30 April 2021, the CERN Pension Fund Benefits Service contacted the Organization’s private insurer, stating that Dr G., the member of the panel of doctors appointed by the two other doctors on the panel pursuant to the procedure set out by Annex 2 to AC 14, had set “a rate of PPI [permanent partial incapacity] of 15%”.

The complainant was informed on 24 June 2021 that his medical file was to be transferred to the private insurer selected by CERN to calculate and pay out this type of indemnity.

On 27 August 2021 the complainant was also informed by an email from the office of the Head of the HR Department that he would receive the sum of 11,874.60 Swiss francs by way of an indemnity for deterioration of physical health. However, the detail of the calculation of that sum was not provided. The complainant was requested to return to the CERN Pension Fund an ad hoc receipt, duly completed and signed.

On 25 October 2021 the complainant lodged an internal appeal to challenge the aforementioned decision of 27 August 2021.

On 23 November 2021, while the internal appeal proceedings were ongoing, the complainant filed his third complaint with the Tribunal, impugning the decision of 27 August 2021.

By a letter of 24 November 2021, the Director for Finance and Human Resources informed the complainant that he considered that the internal appeal was only receivable in so far as it concerned the calculation of the amount of the indemnity, and thus not the establishment of its rate at 15 per cent.

Subsequently, on 4 November 2022 the Joint Advisory Appeals Board issued its report on the internal appeal lodged by the complainant on 23 October 2021, in which it recommended that the calculation of the indemnity in question be maintained.

On 2 December 2022 a final decision was delivered by the Director for Finance and Human Resources, acting on delegation of power from the Director-General, which maintained the calculation of the indemnity as determined by the Organization's private insurance partner. That is the decision impugned in the complainant's fourth complaint.

In his third and fourth complaints, the complainant asks the Tribunal: (1) to set aside the aforementioned decisions of 27 August 2021 and 2 December 2022; (2) to order the award of an indemnity for deterioration of physical health, calculated on the basis of a rate of 100 per cent; (3) subsidiarily, to refer the case back to CERN for a proper assessment of the rate of deterioration of physical health; (4) to award him 20,000 euros in moral damages in connection with each of these complaints; and (5) to award him costs in the amount of 15,000 and 10,000 euros, again in connection with each complaint.

CERN asks the Tribunal to dismiss the complaints as partly irreceivable and otherwise unfounded.

CONSIDERATIONS

1. In his third and fourth complaints, the complainant asks the Tribunal to set aside, firstly, the decision of 27 August 2021, which set at 11,874.60 Swiss francs the amount of the indemnity for deterioration of physical health due to him owing to the consequences of his occupational accident on 30 April 2013, and, secondly, the decision of 2 December 2022 rejecting the internal appeal which he had lodged against that decision. He considers that the amount in question, which corresponds to a rate of deterioration of physical health of 15 per cent, is inadequate in view of the true seriousness of the injury and asks the Tribunal to order the award of an indemnity calculated on the basis of a rate of 100 per cent.

2. The two complaints are closely linked since, as has just been stated, the fourth complaint is directed against the decision that rejected the internal appeal lodged against the decision which is the subject of the third complaint. It should also be noted that the complainant's pleas in support of both complaints are identical in every respect.

In these circumstances, the Tribunal considers that the complaints should be joined in order that a single judgment be rendered.

3. The Organization argues that both complaints are irreceivable by virtue of the general principle of law that a person cannot simultaneously litigate the same issues in separate or concurrent proceedings (see, for example, Judgments 4778, consideration 7, and 4286, consideration 7). It argues in this respect that the Director-General's decision of 21 April 2021, which, according to the Organization, had confirmed that the complainant suffered from a 15 per cent deterioration of physical or mental health, has already been impugned in the complainant's second complaint. It also considers, as regards the third complaint, that the internal remedies had not yet been exhausted when the complaint was filed.

4. However, on the first point, the Tribunal notes that the essential purpose of the Director-General's letter of 21 April 2021 was to notify the complainant of the decision refusing to recognise that he suffered from a disability rendering him permanently incapable of work within the meaning of Annex 2 to Administrative Circular No. 14 (Rev. 4) concerning the "Protection of members of the personnel against the financial consequences of illness, accident and incapacity for work" (hereinafter "AC 14"). The complainant's second complaint, which is the subject of Judgment 4904, also delivered in public this day, is directed solely against that decision.

It is true that, in that same letter of 21 April 2021, the Director-General also noted that one of the members of the panel of doctors had established a 15 per cent deterioration of physical or mental health and that she had therefore asked the Human Resources Department to contact the complainant as soon as possible "to explain [to him] the procedure set out in Annex 3 to AC 14" in respect of "[i]ndemnities for deterioration of physical or mental health or death of occupational origin". However, apart from the fact that, as will be explained below, this letter did not constitute a decision on the second point, the second complaint did not concern the award of an indemnity for deterioration of physical health.

As the third and fourth complaints thus have a different subject matter from that of the second complaint, the objection to receivability based on an alleged duplication of proceedings will be dismissed.

5. As regards the second objection, the Tribunal notes that Chapter VI of the CERN Staff Rules and Regulations confers the right of appeal solely on "members of the personnel", which, as the Tribunal has already held, does not include former members of the personnel (see Judgment 1399, consideration 10). The complainant, as a former member of the personnel, was not therefore required to exhaust the internal remedies and could file a complaint directly with the Tribunal (see Judgments 3915, consideration 3, 3679, consideration 4, 3505, considerations 3 and 4, and 3074, consideration 13, as well as aforementioned Judgment 1399, considerations 7 and 10). It follows

that the plea of irreceivability alleging a failure to exhaust the internal remedies in respect of the third complaint must therefore be dismissed in any event.

6. By contrast, the Tribunal observes that the complainant's pleas calling into question the lawfulness of the procedure followed before the JARDB have already been examined in Judgment 4904, also delivered in public this day, and are moreover irrelevant to this complaint as they concern, as has already been stated, a different decision, namely the decision not to recognise him as suffering from a disability within the meaning of Annex 2 to AC 14. They will therefore not be considered in this judgment.

7. In his third complaint, the complainant states that he challenges what he describes as a "decision" taken by the Finance and Human Resources Department of 27 August 2021 to "set" at 15 per cent the rate of deterioration of physical health recognised to him by the Organization.

The Tribunal notes that the email of 27 August 2021 is not presented as a formal decision but as a request to sign a receipt in order to allow the complainant to be paid the sum of 11,874.60 euros. The fact remains, however, that it was in fact through this email that he learned of the amount that CERN considered it should pay him as an indemnity for deterioration of his physical health. However, that amount had evidently been calculated on the basis of a rate of deterioration of physical health set at 15 per cent – even though that rate was not explicitly stated in the email or in the documents appended to it.

It follows that a decision must necessarily have been taken previously, following the aforementioned letter of 21 April 2021, setting the abovementioned rate at 15 per cent, even though, in view of the evidence on file, that decision was apparently not formalised in a written document. Consequently, since the complainant was informed of the existence of such a decision for the first time, implicitly and indirectly, by the aforementioned email of 27 August 2021, the Tribunal considers that the complainant had no other option but to

challenge both the established rate of deterioration of physical health and the amount of the resulting indemnity following that email of 27 August 2021. It should therefore be considered that the complainant's third and fourth complaints are also directed against the decision to set the rate of deterioration of physical health at 15 per cent.

8. Regarding the complainant's pleas in support of his complaints, the Organization observes generally that the rate of 15 per cent in respect of the deterioration of his physical or mental health "was determined in accordance with CERN's internal rules and the Tribunal's case law".

In this regard, the Tribunal notes that the relevant provisions may be summarised as follows:

- (1) under paragraphs 19 and 45 of AC 14, the "[i]ndemnity for deterioration of physical or mental health" is a "financial compensation paid by the Organization to a staff member [...] in the event of a permanent deterioration of his physical and/or mental health of occupational origin", bearing in mind that "[p]ermanent deterioration of the physical and/or mental health of a [...] former staff member [...] resulting from an occupational accident or illness shall entitle the member of the personnel concerned to an indemnity in accordance with the conditions laid down in Annex 3 [to] this circular";
- (2) under paragraph 2 of Annex 3 to AC 14, the staff member concerned may, if appropriate, be required to respond to questions from the private insurer with which the Organization has taken out an insurance policy to cover the risk of deterioration of physical or mental health of occupational origin;
- (3) under paragraph 3 of Annex 3 to AC 14, "[a]ll persons seeking an evaluation of a permanent deterioration of their physical or mental health must submit [a] questionnaire [included in this paragraph] to the doctor(s) they have chosen for this purpose, together with a copy of this circular and, in particular, of this annex";

- (4) paragraph 4 of this annex reproduces the table setting out the rates taken into account for the calculation of the corresponding benefits, with a caption explaining that the applicable scale is “that of Annex 3 [to] the OLAA (Swiss Federal Ordonnance on accident insurance [of 20 December 1982])”;
- (5) for deterioration not shown in the table, paragraph 5 of Annex 3 states that “the Organization shall apply the scale set out therein by analogy, taking account of the seriousness of the deterioration, on the proposal of the consulting medical practitioner and, where appropriate, on the basis of a technical medical evaluation”;
- (6) paragraphs 6, 7 and 9 of the same annex provide respectively that “[t]he total loss of the use of an organ shall be deemed to be the same as the loss of the organ”, that “[t]he rate of indemnity shall be proportionately reduced [...] in the case of partial loss of an organ or its use” and that “[i]f, in a specific case, the loss or complete and permanent paralysis of a member or organ handicaps a specialist more seriously in the exercise of his professional activities, the rate of indemnity may be increased on the basis of a technical medical evaluation”;
- (7) lastly, under paragraph 12 of Annex 3, the indemnity for permanent deterioration of physical or mental health consists in a “[p]ayment of an amount proportional to the degree of deterioration and equal at most to the amount of one times the annual remuneration on the date of consolidation in the case of 100% deterioration”.

9. In the light of these provisions, the complainant contends, in his first plea, that the Organization did not invite him to submit the medical questionnaire mentioned in paragraph 3 of Annex 3 to AC 14.

Referring to paragraphs 2 and 3 of Annex 3, the Organization submits that the medical questionnaire is “optional”, meaning that it is obligatory only when the staff member concerned initiates the procedure.

However, the Tribunal considers that the rationale of AC 14 does not allow such a distinction to be drawn, since the medical questionnaire to be completed by the doctor(s) chosen by the complainant in the procedure for recognising deterioration of physical health is the only way of initiating that procedure, and that there is nothing to suggest that an alternative means exists to do so.

By not allowing the complainant to submit a medical questionnaire completed by the doctor of his choice, who could have, if appropriate, conducted a different assessment of his medical situation taking account specifically of the provisions of AC 14, the Organization denied the complainant the right to have Annex 3 to the AC applied correctly to him.

10. The Tribunal is certainly aware, firstly, that, as the Director-General stated in her letter of 21 April 2021, one of the members of the panel of doctors, appointed by joint agreement of his colleagues in the procedure set out in Annex 2 to AC 14, had already indicated that the complainant was suffering from a 15 per cent rate of deterioration of physical health and, secondly, that the member of the panel appointed by the complainant had also reached that conclusion, although he used the expression “permanent partial incapacity”, which does not correspond to the exact terminology used in Annex 3 to AC 14.

However, such findings are not sufficient to justify the failure to comply with the procedure laid down in Annex 3 to the AC, as recalled above.

11. The Organization argues that, since the 15 per cent rate of deterioration of physical health was, according to it, determined spontaneously by each of the three members comprising the panel of doctors in the procedure set out in Annex 2 to AC 14, it took the initiative of accepting that evaluation, which those doctors had already performed, in order to deal more quickly with the case in the interests of the complainant himself.

However, firstly, it does not appear from the file that the member of the panel of doctors appointed by the Organization gave an express view on the rate of deterioration of the complainant's physical health. The Organization's assertion that the panel issued a unanimous opinion on that point is thus incorrect. Secondly, the Tribunal considers that, however laudable in principle, the desire to expedite the procedure did not authorise the Organization to break the rules that it had itself laid down, which constituted a breach of the principle *tu patere legem quam ipse fecisti*.

12. As a result, the procedure followed in the present case breached the provisions of Annex 3 to AC 14. That consideration alone is a sufficient basis to conclude that the decision to set the rate of deterioration of the complainant's physical health at 15 per cent was unlawful.

That decision as well as, for the same reasons and consequently, the decision of 27 August 2021, impugned in the third complaint, and the decision of 2 December 2022, impugned in the fourth complaint, must be set aside, without there being any need to rule on the other pleas directed against them.

The case will be remitted to the Organization for a fresh examination in accordance with the provisions of AC 14, including those of Annex 3 thereto.

13. The complainant further requests the Tribunal to order "the grant of 100% deterioration of physical health".

However, it is not for the Tribunal to order such a measure, which would constitute an injunction against the Organization and would moreover require a medical assessment, thus doubly falling outside its competence.

This claim must therefore be dismissed.

14. In each of the two complaints, the complainant seeks compensation of 20,000 euros for the moral injury he considers he has suffered.

However, the Tribunal finds that the complainant has failed to relevantly establish a causal link between the impugned decisions and the moral injury that they allegedly caused. It is therefore not appropriate to grant this claim.

15. As the complainant succeeds for the most part, he is entitled to costs, which will be set at a total of 10,000 euros for both complaints.

DECISION

For the above reasons,

1. The decision to set at 15 per cent the rate of deterioration of the complainant's physical health and, consequently, the decision contained in the email of the Director for Finance and Human Resources of 27 August 2021, as well as the decision of the same director of 2 December 2022, are set aside.
2. The case is remitted to CERN for a fresh examination, as indicated in consideration 12, above.
3. The Organization shall pay the complainant costs in the amount of 10,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER