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

FORTY-NINTH ORDINARY SESSION

In re BASTARI

Judgment No. 528

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Organization for Nuclear Research (CERN) by Mr. Ferdinando Bastari on 25 June 1981 and brought into conformity with the Rules of Court on 14 September, CERN's reply of 15 December, the complainant's rejoinder of 12 February 1982 and CERN's surrejoinder of 30 March 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Chapter VI of the CERN Staff Rules and Regulations of 1962, Chapter V of the CERN Staff Rules and Regulations of 1968, the CERN circular of 25 June 1962 on compensation in the event of illness or accidents incurred in the course of duty, and Administrative Circular No. 14 of September 1981;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant, an Italian citizen born in 1935, joined the division of CERN known as "MPS" on 1 July 1967. He underwent a medical check-up at the time, and his hearing was recorded as good. As an operator in the electricity supply chambers he was exposed to noise caused mainly by a converter and an oil pump. An audiogram made on 3 July 1968 revealed loss of hearing in his left ear. The converter was replaced with less noisy equipment in May1968 and the pump in 1971. On 27 July 1979 he wrote to the Director-General applying for recognition of permanent partial disability incurred in service and for referral to the Joint Advisory Rehabilitation and Disability Board. On 12 June the Board asked him to write to the leader of the Health and Safety Division and he did so on 11 September. On 30 September he left CERN. On 3 October the division leader replied denying any connection between the noise he might have been exposed to and the loss of hearing. On 2 November 1979 he appealed to the Joint Advisory Appeals Board. In its report of 2 February 1981 the Appeals Board, while expressing regret at the tardiness of his claim, found that CERN had misjudged the risks of his exposure to noise in 1967-68, and it recommended allowing the claim. In a letter of 31 March 1981, which is the impugned decision, the Director of Administration rejected that recommendation.

B. Referring to his pleadings to the Appeals Board, the complainant observes that at the material time the noise at work was almost unbearable, and the wearing of earmuffs was not even recommended. Since he was given no audiogram on recruitment CERN cannot prove that his hearing was already impaired. His deafness is characteristic of service-incurred deficiency, and two other workers on the same premises have been recognised as suffering from service-incurred loss of hearing. As part of his duties he used to put his left ear to the machines, the better to detect vibrations: that explains why only his left ear is damaged. Hypothesis is inevitable. Where there is a lacuna in CERN rules the law of the host State applies, and under Swiss law CERN would be liable for negligence. The burden of proof of a causal link between the noise and the injury does fall on the complainant, but no absolute proof is possible, and CERN has failed to cast doubt on such a link. The complainant invites the Tribunal to declare that his injury was incurred in service and to order CERN to pay him the benefits due on that account and his costs.

C. In its reply CERN contends that the complaint is devoid of merit. It is the Staff Rules and Regulations which govern legal relations between CERN and its staff, not Swiss law. Since the impairment occurred before 3 July 1968, when the first audiogram was made, the material rules are Chapter VI of the Staff Rules and Regulations of 1962, Chapter V of those of 1968, and a circular of 25 June 1962 on compensation in the event of illness or accidents incurred in the course of duty. The appendix to the circular says that an ailment shall be treated as incurred in the course of duty only if it is definitely attributable to the staff member's occupation at CERN. The

complainant has failed to prove this. Reviewing the reports of seven doctors who examined him in 1979, CERN concedes that only its own medical officer found that the impairment was not service-incurred. Three others, however, expressed no opinion on the question. A fifth speaks of a mere possibility. The sixth and seventh failed to establish the matter beyond doubt and admitted the impossibility of doing so. The Appeals Board mistakenly presumed that the impairment was service-incurred and said that the possibility could not be ruled out. The complainant may well have suffered loss of hearing before joining CERN: the doctors do not discuss the matter. It is irrelevant that two other workers suffered loss of hearing and that the complainant may have been at risk in 1967-68. It is his own fault that he cannot prove his allegations since he took ten years to make his claim. Under Swiss law, which he says applies, such a claim must be filed within ten years.

D. In his rejoinder the complainant repeats that where CERN's own rules are silent the general principles of law and, in this instance, Swiss law may be relied on. The requirement of proof "beyond doubt" is the same as that of proof of an adequate causal link as prescribed by Swiss law. Other causes are conceivable, but the doctors sensibly refrained from speculating since they felt they knew the true one. CERN's medical officer did not conclude that the cause was occupational, but the form of impairment he found is generally occupational. The complainant's previous employment in a shop selling stereophonic equipment was unlikely to damage his hearing. It is unreasonable to allege that the cause was not the same as in the case of the other workers. He waited until he left CERN before making his claim because he did not want to be seen as a trouble-maker. Besides, there is no time bar, because until he left he continued to be exposed to the noise that caused the impairment.

E. In its surrejoinder CERN says that it finds nothing new in the rejoinder to suggest that the complaint has any merit. The complainant has failed to establish beyond doubt the occupational cause of the impairment. If he applied his ear to the machinery to detect vibrations the level of noise must have been low and therefore harmless. He never spoke of deafness before 1979, and he has not proved that his hearing was unimpaired before he joined CERN. Nor does he benefit from the presumption of an occupational disease allowed in accordance with Administrative Circular No. 14 of September 1981 because he does not satisfy the conditions set in the circular for such a presumption. In any event the impairment is too slight to constitute a reparable injury.

CONSIDERATIONS:

1. The Staff Regulations of the European Organization for Nuclear Research prescribe special benefits for staff members who incur disability in the course of their employment. The appendix to the circular of 25 June 1962 on compensation in the event of illness or accidents incurred in the course of duty reads: "Any physical or mental illness which is definitely attributable to the staff member's occupation in the Organization, and in particular any illness due to directly or indirectly ionising radiation will be considered an illness incurred in the course of duty".

The complainant joined CERN on 1 July 1967 as an operator in the MPS division. He worked with CERN until 1979. When he left he applied for referral to the Joint Advisory Rehabilitation and Disability Board of a claim for "recognition of permanent partial disability incurred in service". His application was rejected on 3 October 1979 by the leader of the Health and Safety Division on the grounds that his disability was not service-incurred.

2. The complainant observes that from 1967 to 1969 he worked for the MPS Division on premises where the level of noise was very high and he contends that as a result he has suffered loss of hearing in the left ear.

He had a general medical check-up on 9 June 1967 before joining CERN and his hearing was found to be good. No audiogram was made. He was then declared, without qualification, to be fit for employment as an operator.

Not until 3 July 1968 was an audiogram made, and it revealed slight impairment of hearing in the left ear. Many audiograms were carried out between October 1976 and 1979, and they all agree in revealing isolated loss of hearing in the left ear.

3. What the Tribunal must determine is whether the impairment was due to the complainant's performance of his duties between 1 July 1967, when he joined CERN, and 3 July 1968, the date of the first audiogram.

There is, however, another relevant point. Although the complainant took over eleven years to file a claim, it will not be declared time-barred in the absence of an express time limit. The time bar extinguishes obligations, and its existence will not be presumed: it must be expressly prescribed. Moreover, Administrative Circular No. 14 of September 1981 is subsequent both to the facts of the case and to the termination of the complainant's appointment,

and neither party may rely on it. The sole consequence of the delay in lodging the claim is that proof is more difficult; but the matter is one of fact, not of law.

4. The findings of the complainant's check-up on recruitment say nothing of loss of hearing, and the Tribunal therefore allows a presumption in the complainant's favour that his hearing was unimpaired at the time. It is for the employer to make proper arrangements for a comprehensive check-up of the applicant for employment. To expect him to prove that he is in perfect health would be to require him to disprove the existence of any impairment, and that is simply not feasible.

This preliminary conclusion does not mean, however, that the complainant will necessarily succeed. The burden is on him to satisfy the Tribunal, with positive proof, that his impairment was service-incurred.

5. The premises on which he worked from July 1967 to July 1968 were undoubtedly very noisy: all the evidence agrees on that. In 1982 the actual level of noise can no longer be determined. The equipment has been changed, and further evidence on the point would serve no purpose. But the Tribunal may conclude from the evidence, including the highly detailed report submitted by the Joint Advisory Appeals Board to the Director-General on 16 February 1981, that "both the noise levels and the equivalent continuous acoustic levels Mr. Bastari was exposed to at work at CERN in 1967-69 were such as to create a risk of injury".

Though the existence of such a risk is, in the Tribunal's view, a material point, it does not suffice to establish that the complainant's disability was service-incurred, and the Tribunal will therefore consider his further pleas.

Other members of his work team have had medical checkups. The written evidence includes a report by the CERN medical service saying that two other staff members have suffered loss of hearing because of the discharge of their duties. But the hearing of four employees is normal, and although the hearing of five others is imperfect it cannot be said with certainty that the impairment was service-incurred. In any event these other employees have all worked longer than the complainant as operators in the MPS Division.

Lastly, there are the medical diagnoses. The medical officer of CERN declares that "Mr. Bastari's audiometric curves do not suggest any service-incurred trauma". The other doctors who have examined him do give opinions which are in his favour. But the five ear-nose-and-throat specialists mentioned by Dr. Corcelle, a general practitioner, do no more than concede the likelihood of a causal link between the complainant's impairment and the discharge of his duties. The Joint Advisory Appeals Board summed up in these terms:

"Mr. Bastari shows a slight imperfection of hearing in the left ear and the Board cannot on medical grounds rule out the possibility that it was caused by exposure to noise at work."

This is cautious wording, and is not such as to allow the Tribunal to declare that the conditions in the appendix to the circular of 25 June 1962 are fulfilled in the complainant's case. The presumptions in his favour are, with regard to all the points at issue, neither sufficiently precise nor sufficiently concordant for his claim to succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

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