CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 523/2012 and 524/2012 (Laurent LINTERMANS (I) and (II) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Antonio CANGELOSI, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Laurent Lintermans, lodged his appeals on 22 February 2012. They were registered the same day under Nos. 523/2012 and 524/2012.

2. On 18 April 2012, the appellant's legal representative lodged further pleadings.

3. On 30 July 2012, the Secretary General lodged his observations concerning the appeal. The appellant lodged observations in reply on 19 September 2012.

4. The public hearing on these appeals took place in the Administrative Tribunal's hearing room in Strasbourg on 8 November 2012. The appellant was assisted by Mr Giovanni Palmieri, Council of Europe staff member, who was replacing Mr Marcel Piquemal, the appellant's legal representative. The Secretary General was represented by Ms Christina Olsen of the Legal Advice Unit, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, administrative officers in the same department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant, a Belgian and Swiss national, aged 40, is a former Council of Europe staff member who has been receiving an invalidity pension since 1 November 2011. He summarised the facts concerning him as follows:

6. He joined the Organisation in September 2006 as an administrative officer (grade A2) and was given a post in the Directorate General of Social Cohesion. In particular he worked as secretary for the committees of experts on nutrition, food safety, flavouring substances, food contact materials and "universal design" (accessibility for people with disabilities). He was responsible not only for managing secretarial services for the experts' meetings but also for the activities of these sectors of the Council of Europe at conferences and other events.

7. The appellant held this post until 17 January 2006 when he asked to take unpaid leave for health reasons. When he returned to work he was given a post in the general secretariat of the Parliamentary Assembly and more specifically in the secretariat of the Committee on the Environment, Agriculture and Local and Regional Affairs.

8. Over the period 2002-2005 alarming symptoms appeared, reflecting a gradual and significant deterioration of his nervous system, his general state of health, the quality of his life and his wellbeing. It was on account of these problems that the appellant requested and was allowed to take unpaid leave. During this three-year period he settled in Paris where he took a further training course. His general state of health improved. However, some of the health problems that had first appeared in Strasbourg became chronic. The origin of these symptoms had not yet been established. When he returned to Strasbourg in July 2008, his state of health rapidly deteriorated. He was unable to remain more than three days in an office at the Palais de l'Europe before being placed on sick leave. That was when he consulted Dr K. in Freiburg and was diagnosed, on the basis of objective tests, as suffering from electro-sensitivity to pulsed microwave radiation. Such electro-waves can cause various types of pathologies.

9. During one period of sick leave, which lasted until he was declared an invalid, the appellant received treatment to remedy the effects of the radiation and restore his neurological balance.

10. When informed of this situation, and at the appellant's request, the Council of Europe Administration forwarded to him the results of the microwave exposure measurements carried out in 2007. These measurements showed that in the Palais de l'Europe and the Human Rights Building there was a certain level of microwave density. It varied according to the area and did not exceed the exposure limits set by French law. However, during the period 2002-2005 the appellant occupied an office in the prefabricated temporary buildings where no exposure measurements had been carried out, although they were situated close to several mobile phone relay antennas.

11. In 2009, the appellant asked that the Invalidity Board be convened, in accordance with Article 13.1 and Instruction 13/2 of the Pension Scheme Rules. On 25 September 2009 the Board decided that the appellant was "not suffering from permanent invalidity which totally prevents him from performing his job or any duties corresponding to his experience and qualifications which may have been proposed to him by the Organisation" and that "the temporary incapacity to work remains justified given the current state of [his] health".

12. After meeting again in 2011, the Board concluded, on 26 October 2011, that the appellant was "suffering from permanent invalidity which totally prevents him from performing his job or any duties corresponding to his experience and qualifications which may have been proposed to him by the Organisation". However, the Board noted that this invalidity did not "result from an incident recognised by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules" and that it did not "fall within category 3 as defined by French Social Security", in other words the inability to engage in any gainful occupation and the need for assistance from a third party in order to carry out essential everyday tasks.

13. On 9 November 2011 the appellant received an e-mail from the Directorate of Human Resources informing him that he had been recognised as an invalid. He also received a copy of the findings of the Invalidity Board and a memorandum setting out the details of his invalidity pension.

On 5 December 2011, the appellant submitted an initial administrative complaint to the Secretary General against the decision to recognise him as an invalid, given that the findings of the Invalidity Board stated that the event which had caused his illness was not "recognised" by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules. A footnote pointed out that this provision concerns "invalidity arising from an accident in the course of the performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being".

14. On 22 December 2011, the Secretary General dismissed the administrative complaint on the grounds that it was inadmissible and unfounded. He noted that the appellant had not lodged his administrative complaint against an administrative act adversely affecting him, as required by Article 59, paragraph 2, of the Staff Regulations, and that he had not yet come to a decision as to whether the appellant's illness could be classed as an occupational disease. At the same time, he argued that his decision not only on recognition of the invalidity itself but also on whether the illness could be classed as an "occupational disease" had to be taken in accordance with the findings of the Invalidity Board.

15. On 2 January 2012, the appellant lodged a second administrative complaint in the event that the Secretary General considered that the opinion set out in his aforementioned decision constituted an administrative decision that might adversely affect the appellant. He also submitted an administrative request in the event that the Secretary General considered that his decision to dismiss the complaint was not a decision that might adversely affect him.

The administrative complaint was dismissed on 30 January 2012.

II. THE RELEVANT PROVISIONS

16. Article 59 of the Staff Regulations reads as follows:

> 1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period

shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them (…).

3. The complaint must be made in writing and lodged via the Director of Human Resources (…)

d. within thirty days from the date of the implicit decision rejecting the request referred to in paragraph 1.

4. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint".

17. The relevant provisions of the Pension Scheme Rules read as follows:

Article 13 – Conditions of entitlement – Invalidity Board

"1. Subject to the provisions of Article 2, an invalidity pension shall be payable to a staff member who is under the age limit laid down in the Staff Regulations and who, at any time during the period in which pension rights are accruing to him, is recognised by the Invalidity Board defined below to be suffering from permanent invalidity which totally prevents him from performing his job or any duties corresponding to his experience and qualifications which may have been proposed to him by the Organisation.

2. The Invalidity Board shall consist of three medical practitioners, the first two being appointed by the Organisation and the staff member concerned, respectively, and the third one selected jointly by the first two. Cases shall be submitted to it by the Organisation either on its own initiative or at the request of the staff member."

Instruction 13/3 – Invalidity Board

Tasks of the Invalidity Board

Subject to the provisions of Article 2, the tasks of the Invalidity Board are:

a) to ascertain whether a staff member is suffering from invalidity within the meaning of Article 13, paragraph 1.

b) when an incident is recognised by the Organisation as falling within the scope of Article 14, paragraph 2 (work accident, occupational disease or public-spirited act), to decide to what extent the staff member's invalidity is the result thereof;

c) to decide whether, following an examination under Article 16, the former staff member no longer fulfils the conditions for entitlement to an invalidity pension.

Meeting of the Invalidity Board

(...)

viii) The Invalidity Board shall have at its disposal:

a) an administrative file submitted by the Head of Personnel containing, in particular, an indication of the post occupied by the staff member in the Organisation together with a description of his duties and of any duties proposed to him by the Organisation corresponding to his experience and qualifications, so that the Board can give its opinion as to whether the staff member is incapable of carrying out those duties. This file shall also specify whether the application to be declared an invalid is likely to fall within the scope of Article 14, paragraph 2.

(...) .

b) a medical file (...)

All these reports, documents and certificates must be communicated to the three medical practitioners.

ix) The proceedings of the Invalidity Board shall be secret.

(...).

xi) The findings of the Invalidity Board shall be determined by a majority vote. They shall be final except in the case of obvious factual errors.

Findings under Article 13, paragraph 1 or Article 14, paragraph 2

xii) The findings of the Invalidity Board shall state:
- whether or not the staff member suffers from permanent invalidity which totally prevents him from performing his duties or any duties proposed to him by the Organisation corresponding to his experience and qualifications.
- whether the invalidity results from an incident recognised by the Organisation as falling within the scope of Article 14, paragraph 2 (work accident, occupational disease or public-spirited act);
- the date on which the disability became lasting; this date may be prior to the date of the meeting of the Invalidity Board.

Instruction 13/4 – Decision of the Secretary/Director-General

Decision under Article 13, paragraph 1, or Article 14, paragraph 2

In accordance with the findings of the Invalidity Board and without prejudice to the competence of the Appeals Board/Administrative Tribunal, the Secretary/Director General of the Organisation shall decide either:

a) to grant to the staff member concerned an invalidity pension under Article 13, paragraph 1, or Article 14, paragraph 2; this decision shall specify the date on which the pension takes effect; or,
b) not to recognise the staff member as an invalid within the meaning of the Rules.

Article 14 – Rate of pension

(...)

2. However, where the invalidity arises from an accident in the course of the performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being, the invalidity pension shall be 70% of salary. In the event of invalidity resulting from a cause other than these, the invalidity pension provided for in this paragraph may not be less than the invalidity pension which would be payable under paragraph 1 of this Article.

(...)

Instruction 14.2 – Work accident and occupational disease
For the purposes of Article 14, paragraph 2, reference shall be made to the Rules applicable in the Organisation for the definition of the risks of work accident and occupational disease"

18. Rule No. 1332 of 25 May 2011 concerns benefits in the event of death, permanent and total disability or long-term care. Article 1 defines a work accident or an "industrial disease" as follows:

"any accident which is caused by, or occurs in the course of, functions undertaken in the Organisation and which causes physical or mental harm to a principal beneficiary in active service. Work accidents shall also include accidents occurring during a staff member's normal journey to and from work; when a staff member travels between buildings occupied by the employer; when a staff member is travelling to or from an official destination or performing duties connected with an official journey (unless the journey has been interrupted for personal reasons unconnected with the staff member's duties); or during the journey preceding the staff member's taking up his/her duties or following the cessation thereof, provided the accident occurs during a journey made according to the routes and within the time-limits laid down in accordance with the Organisation's rules. The journey must not have been interrupted, or a detour, have been made, for personal reasons unconnected with the principal beneficiary's duties.

Industrial diseases caused by duties performed on behalf of the Organisation (illnesses resulting from a succession of external events or a progressive effect linked to working conditions) shall count as work accidents.

Work accidents or industrial diseases shall include the further effects of an accident occurring, or an industrial disease contracted, while a staff member was performing his/her duties, even if these effects manifest themselves when he/she has left the Organisation.

If problems arise with the interpretation of the principles relating to work accidents or industrial diseases, French legislation on accidents at work and industrial diseases, and the relevant French case law, shall apply by analogy."

IN LAW

I. JOINDER OF THE APPEALS

19. In view of the related nature of the two appeals, the Administrative Tribunal decided that they be joined in accordance with Rule 14 of its Rules of Procedure.

II. THE PARTIES' SUBMISSIONS

A. As to the admissibility of the appeals

20. The appellant argues that his administrative complaint of 5 December 2011 was directed against an administrative act adversely affecting him, within the meaning of Article 59, paragraph 2, of the Staff Regulations. He points out that the findings of the Invalidity Board stated that it noted the fact that the appellant's permanent invalidity did not result from an incident recognised by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules. He had understood the text as reporting the fact that the Organisation had informed the Invalidity Board that it did not recognise the occupational disease and that the Invalidity Board had done no more than take note of this. The e-mail of 9 November 2011 contained an implicit decision of the Secretary General not to recognise that the illness at the origin of his invalidity was an occupational disease as defined in the Pension Scheme Rules. The appellant adds that the defendant's argument that the e-mail of 9 November 2011 could not be interpreted as refusing such recognition is refuted by the Secretary General, who emphasises his alleged duty to abide by the opinion of the Invalidity Board in this matter too.

21. In the context of Appeal N° 524/2012, he considers that no objection of inadmissibility can be raised. Even if the decision of 9 November 2011 were not interpreted as containing an administrative act that might adversely affect him, it has to be admitted that the decision of 22 December 2011 to dismiss the complaint contains an administrative decision of this type. Moreover, in the decision of 30 January 2012 dismissing his complaint, the Secretary General does not plead the inadmissibility of the complaint.

22. The Secretary General for his part asks the Tribunal to declare Appeal N° 523/2012 inadmissible on grounds of failure to exhaust internal remedies, as the appellant could not claim that there had been an implicit decision and he had not waited until the end of the statutory time-limit to obtain a decision. As for Appeal N° 524/2012, the Secretary General does not dispute its admissibility.

B. As to the merits of the appeals

23. The appellant firmly believes that the Secretary General's decision not to recognise his occupational disease is contrary to the provisions of the Pension Scheme Rules and the other relevant provisions.

24. Analysing the relevant provisions of the Pension Scheme Rules, the appellant observes that the Secretary General's decision on the granting of an invalidity pension is considered, under the Pension Scheme Rules, to be a decision in which he has no margin of discretion. In his opinion, the terminology used by the Invalidity Board in its findings of 26 October 2011 shows that it finds that "this permanent invalidity (…) does not result from an incident recognised by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules". Instruction 13/2 does indeed contain in paragraph xii a reference to "the findings of the Invalidity Board" and to the details which these findings must contain.

25. Analysing Article 14, paragraph 2, and Instruction 14.2, the appellant concludes that the Invalidity Board gives an opinion on whether his illness can be classified as an "occupational disease", but that, in the absence of any textual elements stating the contrary, the general rule that administrative decisions fall within the Secretary General's discretionary power still applies. For the appellant, it is clear that in deciding whether he is suffering from an occupational disease the Secretary General must take as a basis the rules that are applicable within the Organisation and in particular the definition of "occupational disease" set out therein. He will, of course, take account of the opinion of the Invalidity Board, but the latter is by no means binding in respect of this specific point.

26. Referring to Rule No. 1332 of 25 May 2011, the appellant considers it proven that the illness from which he is suffering and which led to his invalidity is attributable to the performance of his duties at the Council of Europe and resulted from a succession of external events and a progressive effect linked to working conditions. At the same time, the appellant argues that the objections of the Secretary General set out in the two decisions dismissing his administrative complaints are unfounded. He asks the Tribunal to set aside the Secretary General's decision not to recognise the "occupational" nature of the illness by reason of which he was declared an invalid.

27. The Secretary General for his part argues that, if he accepted the arguments put forward by the appellant, he would be obliged to abide by some of the Board's findings (those concerning whether or not to grant an invalidity pension) but not the part of the findings concerning the granting of an invalidity pension under either Article 13, paragraph 1, or Article 14, paragraph 2, of the Pension Scheme Rules.

28. The Secretary General argues that the Invalidity Board, while acknowledging that the appellant is suffering from invalidity, found that this invalidity did not result from an incident recognised by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules. The Secretary General does not have access to the medical files of Council of Europe staff members and has no authority to give an opinion on a person's state of health. In the instant case, the doctors on the Invalidity Board, the only persons with authority to make a medical diagnosis, came to the conclusion that the appellant's permanent invalidity did not result from an occupational disease. It is not for the Secretary General to dispute this conclusion. Indeed, although the appellant believes that "the decision in this matter lies with the Secretary General", attention should be drawn to the provisions of Instruction 13/4 of the Pension Scheme Rules (Appendix V to the Staff Regulations):

"In accordance with the findings of the Invalidity Board and without prejudice to the competence of the Appeals Board/Administrative Tribunal, the Secretary/Director General of the Organisation shall decide either:

a) to grant to the staff member concerned an invalidity pension under Article 13, paragraph 1, or Article 14, paragraph 2; this decision shall specify the date on which the pension takes effect; or,
b) not to recognise the staff member as an invalid within the meaning of the Rules."

29. It is clear from this provision that the Secretary General takes the decision in accordance with the Board's findings. In formal terms, he is the person taking the decision, but he is obliged to abide by the Board's findings. He endorses the Board's findings and cannot overturn them.

30. The appellant tries to argue that only the decision to grant an invalidity pension must be in accordance with the Board's findings. He claims that the decision that his invalidity does not result from an occupational disease is not one of the Board's findings but merely an opinion which it expresses, an opinion which the Secretary General may choose to accept or not. However, one need only read the findings of the Invalidity Board to see that it did not simply give an opinion but took a decision on the three points submitted to it. It found that the appellant suffered from permanent invalidity and that it did not result from an occupational disease and did not fall within category 3 as defined by French Social Security.

31. Moreover, even if the Secretary General was not obliged to abide by the Board's findings and if it was up to him to determine the existence of an occupational disease, in deciding to dismiss the appellant's administrative complaint he exercised the discretionary power vested in him. He took the decision to dismiss the appellant's complaint and not to recognise the existence of an occupational disease in the appellant's case. In fact, the Secretary General has never taken a decision going against a finding of the Invalidity Board that a staff member's invalidity was the result of an accident or an occupational disease. As these two possibilities can only be based on medical facts, it is the Board's responsibility to give its opinion on this point. It is true that, in one case, the Secretary General decided that a staff member's permanent invalidity was the result of "risking his life to save another human being", a decision which did not appear in the findings of the Invalidity Board, and for good reason. This decision lay with the Secretary General and not with the Board as it was not based on any medical evidence but on the material contained in the file. Moreover, irrespective of the reputation and expert knowledge of the doctors who provided the appellant with medical certificates and of the nature of the other evidence submitted, it must be pointed out that, under the regulations in force at the Council of Europe, it is the Invalidity Board which is responsible for deciding on the question of invalidity and its origin. The Board gave its decision and, under internal regulations, this is the proper procedure for determining eligibility for an invalidity pension.

32. The Secretary General adds that the Pension Scheme Rules are very clear: the right to an invalidity pension depends on whether or not the Invalidity Board recognises a permanent invalidity. The appellant and his doctor were free to submit all the evidence and documents they wished to the Board and made use of this possibility.

33. Insofar as the appellant relies on Article 1 of Rule No. 1332 of 25 May 2011, it should first be pointed out that the Rule and its provisions are not applicable to him because they concern only those receiving payment of a capital sum, which is not the appellant's case.

34. The Secretary General maintains his view and considers that, as far as the medical findings are concerned, he has a duty to abide by the findings of the Invalidity Board, in

accordance with the statutory provisions. The appellant is the only one to dispute the provisions in force. The Secretary General remains convinced that the statutory provisions relevant to this matter are clear and that he must take his decision in accordance with the findings of the Invalidity Board, which is the body responsible for judging whether a staff member is suffering from permanent invalidity or not and, if so, whether or not it is the result of an occupational disease.

35. It follows from all of the foregoing elements that there has been no breach of the provisions of the Staff Regulations, of other regulations, of the general principles of law or of practice, or any formal or procedural defect, that all the relevant elements were taken into account, that no incorrect conclusions were drawn from the documents in the file and, last, that there has been no misuse of powers.

36. The Secretary General therefore asks the Administrative Tribunal of the Council of Europe to declare Appeal No. 523/2012 inadmissible and/or ill-founded and Appeal No. 524/2012 ill-founded and to dismiss it.

III. ASSESSMENT OF THE TRIBUNAL

A. *Admissibility of the appeals*

37. The Tribunal must first deal with the question of the admissibility of the first appeal even if this is not *de facto* of any real importance for the parties, given that the appellant lodged a second appeal which, although directed against a different administrative act, refers to the same point of dispute.

38. The Tribunal accepts the interpretation given by the Secretary General in his first e-mail and the first appeal is therefore premature.

39. The Tribunal comes to the conclusion that the objection is founded because the appeal – which presents the same arguments as the second appeal – is directed against an administrative act that has not yet adversely affected the appellant.

40. Appeal N° 523/2012 is therefore to be declared inadmissible because the appellant was not subject to an administrative act adversely affecting him within the meaning of Article 59, paragraph 2, of the Staff Regulations.

41. The Tribunal must now examine the appellant’s grounds of appeal to the extent that they relate to Appeal No. 473/2011.

B. The merits of the appeals

42. Contrary to what the appellant thinks, the Tribunal considers that it is for the Invalidity Board to decide whether his illness is of an occupational nature and, in this area too, the Secretary General has no margin of discretion.

43. The Tribunal fails to see how it could be otherwise, given that the assessment of whether a medical fact is linked to an employee’s work can only be made by the Invalidity

Board. To interpret the texts as allowing the Secretary General to adopt a different position from that of the Invalidity Board – which, according to the appellant, as far as this specific point is concerned, was only giving an "opinion" on the occupational nature of the illness, an opinion which the Secretary General was not obliged to abide by – would be to distort the spirit of these texts, which require medical matters to be decided by a medical body.

44. Consequently, all the questions and arguments submitted by the appellant with the aim of emphasising the Secretary General's authority to decide this matter must be dismissed.

45. Given that the Tribunal nevertheless has authority to rule on the question of whether the Invalidity Board correctly applied the statutory text, it considers that it can rule on the matter without having to request further details concerning the Board's findings.

46. Rule No. 1332, Article 1, gives the following definition of industrial disease:

> "Industrial diseases caused by duties performed on behalf of the Organisation illnesses resulting from a succession of external events or a progressive effect linked to working conditions) shall count as work accidents"

47. On the basis of the information submitted to it, the Tribunal can only observe that, according to the research carried out in the Organisation, the results of the microwave exposure measurements carried out in 2007 show that there was a certain level of microwave density. However, this level does not exceed the exposure limits set by French law. No negative conclusion can be drawn from the fact that, according to the appellant, who does not however prove his claim, French legislation is, "among those in force in Council of Europe member states in this field, not the most stringent".

48. However, given that the problem from which the appellant is suffering originates in his own electro-sensitivity to pulsed microwave radiation, it is perhaps impossible to consider his illness as an "industrial disease" within the strict meaning of the definition set out above, as one cannot speak of external events. Although that might account for the fact that his temporary invalidity has become a permanent invalidity, it does not justify recognition of his illness as an occupational disease. The Tribunal's finding is supported by the fact that, to its knowledge, French legislation and case-law have only concluded in one similar case that the person's illness was an industrial disease.

49. The Tribunal considers that, although it could choose not to go along with French legislation and case-law, it is not desirable to do so as it is first and foremost for the Organisation to regulate such matters and for the Tribunal to subsequently give its ruling or, in the event of prolonged failure, to take the decisions made necessary by that failure.

IV. CONCLUSION

The appeal is ill-founded and must be dismissed.

For these reasons,

The Administrative Tribunal:

Declares Appeal No. 523/2012 inadmissible;

Declares Appeal No. 524/2012 ill-founded and dismisses it;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 6 December 2012 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 6 December 2012, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS