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

EIGHTY-FIFTH SESSION

In re Dirsing

Judgment 1760

The Administrative Tribunal,

Considering the complaint filed by Mrs. Sandra Dirsing against the European Patent Organisation (EPO) on 4 July 1997 and corrected on 29 August, the EPO's reply of 24 November 1997, the complainant's rejoinder of 9 February 1998 and the Organisation's surrejoinder of 30 April 1998;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant is a Frenchwoman who was born in 1957. The EPO has been employing her since 1 April 1991 as a typist at grade B2. Her first assignment was with the typing service of Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, in Munich.

On 11 August 1993 she fell on a flight of steps on her way home from work and broke several vertebrae. She has since been suffering from various physical ailments which she sets down to the accident.

The Organisation put her on sick leave from 12 August to 8 December. On 1 September 1993 it transferred her, at her request, to the "formalities" service of DG2. In December 1993 she tried working again but had to take sick leave from 21 January 1994. In a letter of 27 July 1994 the Director of Personnel Administration told her that by 5 August 1994 she would have used up the maximum period of paid sick leave allowed under Article 62(6) of the Service Regulations. The period was twelve months, either in one unbroken period or in several periods within three consecutive years. The Director said that the Invalidity Committee would be meeting.

In a first report of 23 September 1994 the Committee said that she was temporarily unfit to resume work and by a majority declared that she was not permanently disabled as the result of accident or serious illness within the meaning of Article 62(7) of the Service Regulations. It recommended four to six weeks' treatment in an orthopaedic hospital. After two of its members had examined her again the Committee issued a supplementary report on 6 December 1994 in which the majority concluded that most of her ailments were due to degenerative change prior to the accident.

In a second report, dated 7 March 1995, the Committee declared her fit to go back to work under certain conditions. She did so on 3 April but the very next day she again took leave on medical grounds. The Invalidity Committee met yet again and in a third report, of 13 June 1995, declared her fit to go back to work and not permanently disabled. It recommended examination of her by the EPO's medical officer if she failed to resume work by 3 July. Having handed in a medical certificate from her doctor on 2 August, the deputy to the medical officer examined her and concluded, in a report of 11 August, that she was fit to work part-time but should avoid strenuous effort. On 23 August the Director of Personnel Administration sent her the report and told her that the Office would henceforth accept medical certificates only from its own medical officer. On 5 September she sent the Director an application for annual leave, saying that she would thereafter resume duty if her health allowed.

In a fourth report, dated 13 February 1996, the Committee decided that she should undergo psychiatric tests since none of the medical examinations had revealed the cause of her disability. The Committee saw the

results of the tests. On 18 November 1996 it made a fifth report in which the majority again concluded that her disability was not due to serious illness within the meaning of Article 62(7) or to the accident of August 1993, but it also decided unanimously to extend her sick leave by eighteen months.

The Director of Personnel Administration informed her of the Committee's decision in a letter of 10 December 1996 and said that, in accordance with Article 62(7), she would get only half her basic salary as from 1 December, the starting date of her extended sick leave.

On 10 February 1997 she asked the President to quash the Committee's decision of 18 November 1996, pay her salary in full as from 1 December and to call a new committee. Otherwise he was to treat her letter as an internal appeal.

By a letter of 24 February the Director of Staff Development told her that the President had rejected her claims but was putting the matter to the Appeals Committee and would send her a full explanation of his decision as soon as possible.

On 4 July 1997 she filed this complaint.

B. The complainant submits that the Invalidity Committee's report of 18 November 1996 shows several procedural flaws.

First, the Committee was not properly "enlightened" on the facts of her case. When it issued the report the two doctors who had taken the decision had not seen her for at least a year. The Committee based its opinion only on the psychiatric report of 1996, which was wrong on several points and which she challenged on 25 November 1996. The Committee did not state the cause of her illness or the reasons for its conclusions. Yet its reasons were indispensable because it differed from all the other doctors she had seen. The three doctors on the Committee never met.

She accuses the Committee of making "contradictory and tendentious" decisions: it found her fit to go back to work, but only half-time and on condition that her duties were greatly altered. It acted against the advice of her own doctor.

In her submission the accident of 1993 is one or even the sole cause of her present disability. Length of sick leave is a sure sign of how serious an illness is. Since her sick leave comes to at least five years, she is obviously suffering from a serious illness within the meaning of Article 62(7). According to German law the Committee should have declared her permanently disabled long ago.

She contends that the Organisation caused her injury: the state of her health and mind is due to the treatment she got from the Invalidity Committee and the Administration.

She asks the Tribunal: (1) to declare that she has a serious illness within the meaning of Article 62(7) of the Service Regulations resulting in total incapacity to perform her duties; (2) to "confirm" the Invalidity Committee's decision of 18 November 1996 declaring her unfit for work but to quash its assessment of the seriousness of her condition; (3) to order the EPO to pay her the difference - 16,494 German marks - between full basic salary for the period from 1 December 1996 to 31 December 1997 and the sum she was actually paid; (4) to award her lump-sum compensation of 186,655 marks for permanent disability; (5) to award her a monthly invalidity pension of 4,615 marks as from 1 January 1998; (6) to prescribe the procedure for medical follow-up of staff receiving invalidity benefit; (7) to award her damages in an amount of 20,000 marks for the physical and mental injury caused by the "degrading treatment" of her; (8) to award her costs; and (9) to set a penalty of 200 marks a day if the EPO fails to execute the present judgment within one month of notification.

C. In its reply the Organisation submits that the complaint is irreceivable on three counts. First, since the internal appeal is not yet over the complaint is irreceivable under Article VII(1) of the Tribunal's Statute. Secondly, it is partly irreceivable in that claims (4) to (7) go beyond those made in the internal appeal of 10 February 1997. Thirdly, and subsidiarily, should the complainant contend that the Appeals Committee is barred by Article 107(2) from hearing her appeal and she has had to come directly to the Tribunal, her complaint is irreceivable because she has failed to file it within the time limit of ninety days in Article VII(2) of the Tribunal's Statute. The defendant points out, however, that Article 107(2) bars appeal only against

purely medical decisions and that she herself in her internal appeal was pleading "many legal flaws in the procedure".

On the merits the Organisation maintains that the report she objects to was properly substantiated. The Invalidity Committee was unanimous that the treatment of the complainant had not yet improved her health and her sick leave should be extended to allow time for therapy. There was nothing inconsistent about the Committee's views. Though she cannot work as before the accident, she is still fit for duty.

The Invalidity Committee may perform its task as it sees fit. Even if the doctors do not meet they keep in touch by telephone and submit their findings to the chairman.

The Appeals Committee has been too busy to take up her appeal of 10 February 1997. That eight months have gone by since she lodged it is reasonable enough.

As to the cause of her incapacity for work, the mere length of sick leave is not sufficient evidence of the gravity of illness.

Since her allegation of harsh treatment by the Administration or the Invalidity Committee is groundless, she fails to prove that the Organisation caused her injury.

D. The complainant rejoins that the letter of 24 February 1997 from the Director of Staff Development does not amount to a "reasoned decision" within the meaning of Article 106(2) in reply to her request of 10 February. That same article says that failure to reply within two months implies rejection. So her complaint, which she filed on 4 July 1997, is receivable under Article VII(3) of the Tribunal's Statute.

Article 107(2) of the Service Regulations says that no appeal lies against a decision taken after referral to the Invalidity Committee; so she had to go directly to the Tribunal. The Organisation put her in "an extremely awkward procedural position": if she had waited for her internal appeal to run its course a complaint to the Tribunal would have been time-barred.

In a subsidiary claim she asks the Tribunal to waive the time bar should it conclude that she ought to have filed within ninety days of getting notice of the Invalidity Committee's report or, failing that, to award her costs against the Organisation even if she loses her case.

She presses her pleas on the merits.

E. In its surrejoinder the Organisation submits that Article 106(2) is immaterial: in her letter of 10 February 1997 to the President the complainant did not ask for an individual decision but challenged the decision in the letter of 10 December 1996. So she did regard that as the decision that set off the time limit, and her complaint is time-barred under Article VII(2) of the Tribunal's Statute.

The Organisation presses its pleas on the merits.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 April 1991. She started as a typist at grade B2 in the typing service of Directorate-General 2 (DG2) but was later transferred, at her request, to the "formalities" service, also in DG2.

2. On 11 August 1993, she had a fall on her way home from work and went on sick leave until 8 December 1993. She was thereafter often absent for reasons of health. Since she had used up her entitlement to paid sick leave under Article 62(6) of the Service Regulations, the EPO put her case to the Invalidity Committee on 27 July 1994.

3. Proceedings before the Committee took long, and it made several reports. In its fifth one, of 18 November 1996, it declared that she was still unfit to go back to work but that her incapacity was due neither to the accident of 11 August 1993 nor to any serious illness within the meaning of Article 62(7). It unanimously decided to extend her sick leave by eighteen months and prescribed long-term treatment and immobility, to be followed by an examination by the Office's medical officer; it would then report on her again.

4. A letter of 10 December 1996 sent her the Committee's fifth report and told her that her sick leave was extended to 31 May 1998. Her pay was accordingly reduced under Article 62(7) as from 1 December 1996.

5. On 10 February 1997 she lodged an internal appeal against the Committee's decision of 18 November 1996.

6. On 4 July 1997 she filed this complaint and her claims are set out under B above.

7. In its reply of 24 November 1997 the EPO submits that her complaint is irreceivable because she has failed to exhaust her internal remedies and, subsidiarily, because it is time-barred. It observes that the proceedings that culminated in the Invalidity Committee's report of 18 November 1996 and in the extension of her sick leave by eighteen months showed neither formal nor substantive flaws, and that there was nothing unethical or unlawful in the handling of her case by the medical officer of the Administration.

8. The material provisions read:

"Article 62

Sick leave

...

(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary."

"Article 107

Possibility of internal appeal

(1) Any person to whom Article 106 applies [such as a serving employee] may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106.

(2) The provisions of paragraph 1 shall not apply to decisions taken after consultation of the Invalidity Committee. ... "

9. The complainant rests claims (1) and (2) as set out under B above on a decision against which no internal appeal will lie under Articles 107(1) and (2) of the Service Regulations. She should have challenged that decision by coming straight to the Tribunal within the time limit of ninety days in Article VII(2) of the Statute. She is mistaken about the date at which the ninety days started: they began on 10 December 1996, when she got notice of the Invalidity Committee's decision. So she had until 10 March 1997 to file her complaint. Since she did not file it until 4 July, claims (1) and (2) are irreceivable.

10. By way of subsidiary claim she seeks waiver of the time bar. The Tribunal's Statute does not allow such waiver.

11. Claim (3), which she put forward in the internal proceedings, is irreceivable too. The President of the Office has not yet taken a final decision on recommendations from the Appeals Committee, and she has therefore failed to exhaust her internal remedies, as Article VII(1) of the Tribunal's Statute required her to

do.

12. Claims (4), (5) and (6), which she has not even put to the Appeals Committee, are likewise irreceivable on account of her failure to exhaust the internal remedies.

13. In her rejoinder she further asks the Tribunal to order the EPO to pay her costs should her complaint fail "because she has misread the above rules": the wording and the connection between them are, she says, so "obscure" as to "block the path of justice".

Since her main claims fail, so too must her claims to damages and to costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

A.B. Gardner