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

EIGHTY-SIXTH SESSION

In re Dirsing (No.2)

Judgment 1802

The Administrative Tribunal,

Considering the second complaint filed by Mrs. Sandra Dirsing against the European Patent Organisation (EPO) on 13 February 1998 and corrected on 16 March, the EPO's reply of 5 June, the complainant's rejoinder of 17 August and the Organisation's surrejoinder of 14 October 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 background to this case is set out in Judgment 1760 of 9 July 1998, which dismissed Mrs. Dirsing's first complaint as irreceivable.

The complainant works for the European Patent Office, the EPO's secretariat, in Munich. On 11 August 1993 she had a fall on her way home from work. She was entitled to twelve months' paid sick leave under Article 62(6) of the Service Regulations, and she had taken it by 27 July 1994, when her case was referred to the Invalidity Committee. In a report dated 13 February 1996, the fourth one on her case, the Committee decided by a majority that she should undergo psychiatric tests in hospital, earlier tests having failed to reveal why she was unable to work. In a written statement of 17 March 1996 her own doctor, who was a member of the Committee, dissented from the other two about the need for psychiatric tests.

She had the tests from 3 to 5 June 1996 at the psychiatric clinic of the Ludwig-Maximilian University of Munich. On 25 November 1996 she appealed to the President of the Office. She wanted the EPO to hand over to her any medical report about her, pay her financial compensation for breach of medical secrecy and disregard any reports on her state of mind. She asked the President to treat her letter as an internal appeal if he refused her claims.

By a letter of 16 January 1997 the President told her that he found her appeal devoid of merit and had passed it on to the Appeals Committee. By a letter of 5 February 1997 the chairman of the Committee acknowledged receipt of her appeal. There followed correspondence between her, the Committee and the Administration. On 13 February 1998 she filed this complaint challenging what she sees as the implied rejection of her appeal.

B. The complainant says that the defendant acted in breach of medical secrecy and of the "law for the protection of personal data". In her submission no provision of law or of the Service Regulations empowered the Organisation to have medical reports made about her or to get hold of them. By asking the hospital to let it have them it failed to ensure that they were made over in confidence to a particular addressee in the Office. A doctor may not without the patient's prior consent hand over the findings of a medical test to a third party. She does not remember releasing the doctors who saw her at the hospital from medical secrecy. The EPO is liable to her for the breach of secrecy since it was at the EPO's instructions that the fault was committed. The publication of the reports inside the Office has caused her serious moral injury because they contain detailed information about her private life and her family.

She pleads several procedural flaws. The two doctors on the Invalidity Committee who had her undergo the psychiatric tests disregarded the opinion of her own doctor, who had certified that the only cause of her incapacity was physical. Only if they had managed to show - and they did not - that her incapacity had no physical cause might they have contemplated some other explanation. She suffered moral injury by having to spend three days and two nights in a special unit in hospital. She takes it ill that the tests were done in German and not in her mother tongue. She is relying on Article 92(3) of the Service Regulations, which says that the proceedings of the Invalidity Committee are secret.

She contends that she was subjected to "constant pressure and threats" from the Organisation to undergo the tests. She consented only to escape further "retaliation" from the Organisation.

She asks the Tribunal to declare that the EPO acted in breach of medical secrecy and the privilege of personal data, to order it to hand over to her any medical report about her and to pay her moral damages. She claims the cancellation of any medical report which the hospital made about her.

C. In its reply the EPO points out that the Appeals Committee has not yet reported on her appeal of 25 November 1996. The time that the Committee has taken over her case is not unreasonable. Since the President of the Office has reached no final decision she has failed to exhaust the internal means of redress and her complaint is irreceivable.

In subsidiary argument on the merits the defendant says that it never got a copy of reports or of other medical findings on the complainant. The hospital sent them straight to the Office's medical officer in a sealed envelope bearing his name. The findings of tests are not imparted to the Administration.

The Organisation says that when the proceedings began before the Invalidity Committee the complainant signed a statement releasing the doctors who would be examining her from medical secrecy in regard to the Committee's own members. The statement is in the records kept by the medical officer.

There is no substance to her plea of breach of the "law for the protection of personal data". If what she means thereby is the guidelines for the protection of personal data at the Office, that text covers only computerised data, and data relating to the invalidity procedure are not computerised. If what she has in mind is German law, it does not apply either, both because the EPO is an international organisation and because German law too protects computerised personal data.

The Organisation denies any flaw in the proceedings that led to her having to undergo psychiatric tests. It is clear from the Invalidity Committee's reports that it acted scrupulously and did first make a finding that her incapacity had no physical cause.

Lastly, it was in no way to her detriment that the tests were done in German since she has a full grasp of the language.

D. In her rejoinder the complainant argues that the Organisation has failed to decide on her internal appeal as promptly "as the seriousness and urgency of the case require". The fault lies with the Administration, which, 13½ months after she had filed her appeal, had not yet submitted its reply to the Appeals Committee.

On the merits she maintains that the EPO got the medical reports from the hospital and that she did not release the hospital doctors from secrecy. The last release she signed goes back to 12 October 1995 and applied to the EPO's own medical officer, who was to examine her at that date. The doctors appointed by the Administration and by the Invalidity Committee are subject to municipal law. Not every breach of the rules that the EPO may commit in handling staff cases is expressly covered in the Service Regulations. She asks the Tribunal to afford her "minimum legal safeguards" when the Regulations say nothing of the protection of basic rights.

Her own doctor did not get all the reports on the psychiatric tests, and she asks the Tribunal to "rule" on that issue. She further asks the Organisation to let her have a copy of the internal guidelines it is applying for the protection of personal data not on computer.

E. In its surrejoinder the defendant observes that on 3 July 1998 the Invalidity Commission decided by a majority that the complainant was suffering from permanent and total incapacity for duty at the Office, but not because of any serious illness, work accident or occupational disease nor, by and large, because of her age. The Organisation presses its objections to receivability and submits that the further claims in her rejoinder are new and therefore irreceivable. It presses its pleas on the merits.

CONSIDERATIONS

1. Most of the background to this case is set out in Judgment 1760, which ruled on Mrs. Dirsing's first complaint. She is now seeking redress for the injury she attributes to breach of medical secrecy and of the law on the

protection of personal data by a doctor appointed by the EPO or by a medical officer or by both.

2. The EPO asked its Invalidity Committee to say whether she was suffering from permanent incapacity for work at the Office. In its fourth report on her case the Committee decided by a majority that she should undergo psychiatric tests in hospital on the grounds that the many examinations that she had already undergone had afforded no explanation for the failure of earlier therapeutic treatment.

3. On 25 November 1996 she filed an internal appeal claiming -

"condemnation of the Office's practice of getting hold of reports that include personal information and using them, without any precaution in distribution, particularly for the purpose of assessing [her] performance;

the immediate forwarding to [her] of any medical report about [her] in the EPO's hands, no copy of it to be kept by the Office;

an award of damages for moral, physical and occupational injury attributable to the breach of medical secrecy and of the law on the protection of personal data;

the cancellation of the medical reports made at the request of the Office, or a medical officer, or both, on [her] state of mind."

4. The complainant acknowledges that she has filed suit before getting a final decision from the President of the Office on a recommendation by the Appeals Committee. She explains that her purpose is to avoid "undue further delay, the forfeiture of her rights and the continuance of the injury".

5. There being no need to rule on receivability, the Tribunal holds that in any event there is not a jot of evidence to bear out the complainant's allegations against the EPO. Insofar as she is alleging breach of medical secrecy, and even supposing such breach were proven, the EPO would not be liable and the matter would not fall within the Tribunal's competence as set out in Article II of its Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 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 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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