NINETY-FIRST SESSION

***In re* Müller-Engelmann (No. 12)** **Judgment No. 2046**

The Administrative Tribunal,

Considering the twelfth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 21 January 2000, the EPO's reply of 19 April which was corrected on 12 May, the complainant's rejoinder of 17 August, and the Organisation's surrejoinder of 13 November 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. Some facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. In December 1996 the complainant was reaching the maximum allowable sick leave under Article 62 of the Service Regulations for Permanent Employees of the European Patent Office, therefore the Office started the procedure to convene an Invalidity Committee. The procedure for nominating the three medical practitioners on the Invalidity Committee is set out in Article 89 of the Service Regulations: the President of the Office and the permanent employee each appoint one member and the third is "appointed by mutual agreement" between the other two members. However, in the complainant's case, more than one year after the commencement of the procedure, there was still no agreement on the third member; therefore, the EPO asked the Medical Advisory Board of the State of Bavaria ("*Bayerische Landesärztekammer*") to propose the third member. On 11 May 1998 the Director of Personnel Management informed the complainant that following the Board's recommendation Dr H. had been nominated. On 17 May 1998 the complainant appealed against the nomination of that physician on the ground that it had not been done in accordance with the Service Regulations. That appeal was registered as RI/43/98; it was withdrawn in May 1999.

In May 1998 the complainant was asked to undergo a medical examination by Dr H. She refused because she was contesting the manner in which he had been appointed to the Committee. Consequently, in a letter dated 8 June 1998, the Director of Personnel Management declared the complainant's absence from work as unauthorised, within the meaning of Article 63 of the Service Regulations, until she underwent the examination. Her salary was subsequently withheld with retroactive effect to 30 May 1998. On 16 June a representative from the Remuneration Department wrote to her, informing her that she would need to pay her own and the EPO's contributions to the social security schemes and pension scheme or her affiliation to the schemes would cease. On 21 June 1998 she appealed against the decisions of 8 and 16 June. Her appeal was registered as RI/71/98.

During the internal appeal procedure the Administration admitted that its reference to "unauthorised absence" under Article 63 of the Service Regulations was "incorrect" and consequently so was the withholding of her salary. It stated that her salary would be paid retroactively in the event that the Invalidity Committee concluded the complainant was unfit for work. The Appeals Committee recommended that the decisions of 8 and 16 June 1998 be quashed, and that the complainant be paid arrears of salary including interest as well as the portion paid by the Office to the social security schemes and the pension scheme on her behalf, and that she be reimbursed for her legal costs. It recommended rejecting all other claims. The President of the Office endorsed these recommendations and so informed the complainant on 17 August 1999. That is the impugned decision.

The Invalidity Committee determined subsequently that the complainant was unfit for work and granted her an invalidity pension with effect from 1 August 1999.

B. The complainant impugns the President's decision of 17 August insofar as he refused to award her damages

which she had claimed in her internal appeal. She submits that he based his decision on the Appeals Committee's opinion that she herself had brought the situation about; however, she contends that it would have been unfair to have her relinquish her rights to "protect" the EPO from the repercussions of its illegal action.

She says that the manner in which the third member of the Invalidity Committee was nominated was in breach of the Service Regulations. The EPO was well aware that she doubted the legality of this physician's nomination to the Invalidity Committee and, rather than convince her otherwise, it chose instead to withhold her salary and exclude her from the social security schemes in an effort to force her to give up her request for clarification about the legality of the nomination. It did not fulfil its duty of care towards her.

She takes issue with the fact that she was asked to undergo an examination by Dr H. when the legality of his nomination on the Committee had not been checked. Contrary to what the Organisation claims, she was injured by its actions. The state of her health worsened and she had to stop taking some of her medications because her medical expenses were not reimbursed. She asks for oral proceedings.

She seeks "reasonable damages" of "no less than" 2,000 German marks plus 8 per cent interest a year from the date of filing her complaint, and costs.

C. In its reply the EPO challenges the complainant's version of the facts. It considers the complainant's main claim to be for an award of damages and asserts that it will address only that issue.

Since the Invalidity Committee has granted the complainant an invalidity pension the claims in her appeal, except the one for an award of damages, have became obsolete. The Organisation submits that according to the Tribunal's case law an award for damages is subject to the existence of an unlawful act and consequent injury. Even if it could be concluded that the Organisation's acts were unlawful, the complainant has not suffered any injury as she was paid retroactively for the full salary. It sees no justification for holding oral proceedings in the context of this complaint and asks the Tribunal to find the complaint unfounded.

As for the complainant's argument that the nomination of the Invalidity Committee's third member was illegal, the EPO contends that the actions it took were necessary to break the deadlock. It submits that asking the Medical Advisory Board of the State of Bavaria to nominate the third member was compatible with the rules of comparable international organisations and the European case law.

D. In her rejoinder the complainant asserts that the crucial issue in her complaint is whether her misgivings about the lawfulness of the Invalidity Committee's composition were justified. She maintains that the decisions of 8 and 16 June 1998 were unlawful acts; it is precisely for this reason that the Administration later withdrew them. Furthermore, she was injured by the decisions. Her salary had been withheld for nine months; this caused her financial hardship and a great deal of stress.

E. In its surrejoinder the Organisation reiterates that the complaint arises out of an appeal in which the complainant requested the quashing of the decisions of 8 and 16 June; effectively this has been done as she has been paid the salary withheld and reinstated into the social security schemes. Not having proved that she has suffered any injury her claim to damages is unfounded. In this regard, it points out that the Appeals Committee unanimously concluded that there was no merit to an award of damages. In fact, her lack of cooperation has hampered the resolution of her disputes with the EPO.

CONSIDERATIONS

1. The complainant impugns a decision of the President of the European Patent Office which endorsed the Appeals Committee's recommendations in appeal RI/71/98 which, inter alia, rejected that part of her claim which sought damages.

2. In 1996, as she was nearing the maximum amount of sick leave allowable under Article 62 of the Service Regulations, the Office started the procedure to convene an Invalidity Committee. One physician was nominated by the complainant and another one by the EPO. However, since the parties could not agree on the nomination of the third physician on the Committee there was some delay in appointing that member. On 11 May 1998 the EPO informed the complainant and the two members of the Committee of the designation of Dr H., a psychiatrist and

neurologist, as the third physician on the Committee, following the recommendation of the Medical Advisory Board of the State of Bavaria ("*Bayerische Landesärztekammer*") which had been consulted by the EPO. By a letter of 12 May 1998 Dr H. invited the complainant to attend an examination on 29 May. The complainant appealed to the President of the Office on 17 May 1998, alleging that the constitution of the Invalidity Committee was not in conformity with the Service Regulations. Her request was referred to the Appeals Committee as appeal RI/43/98. The complainant informed Dr H. on 25 May 1998 that she would not be attending the consultation, as his designation to the Invalidity Committee "seemed not to be in conformity with the Service Regulations".

3. On 8 June 1998 the EPO declared that the complainant's absence from work would be regarded as "unauthorised" within the meaning of Article 63 of the Service Regulations until she had attended the required examination. Her salary was subsequently withheld. By a letter of 16 June the EPO told her that besides her own contributions to the social security schemes and pension scheme she would have to pay those normally paid on her behalf by the Organisation, otherwise her affiliation to the schemes would cease. On 21 June 1998 the complainant asked the President to reconsider the decisions of 8 and 16 June. She also requested, inter alia, the payment of damages. The matter was referred to the Appeals Committee as appeal RI/71/98. In July 1998 her affiliation to the schemes was interrupted.

4. On 9 December 1998 the EPO informed the complainant of the decision to reinstate her as a participant in the social security schemes with retroactive effect. In December 1998 the complainant informed the EPO that she would attend an examination by Dr H. During the oral proceedings which took place before the Appeals Committee on 5 May 1999, the EPO withdrew its decisions declaring the complainant's absence as unauthorised and withholding her salary. The complainant also withdrew appeal RI/43/98.

5. On 18 June 1999 the Appeals Committee unanimously recommended setting aside the decisions of 8 and 16 June 1998 as it found the statement of unauthorised absence from service unlawful. It recommended that the complainant be paid arrears of salary including interest as well as the sums representing the Office's contributions to the social security schemes and the pension scheme in accordance with Article 62(10), to refund to the complainant the procedure-related costs including her legal costs and to reject the claim for damages on the grounds that the complainant caused the EPO's reactions by her refusal to undergo an examination by Dr H.

6. On 17 August 1999 the President endorsed the recommendations of the Committee and agreed to award the complainant costs for the appeal. He rejected her claim for damages. That is the impugned decision.

7. The complainant is seeking an order:

(1) awarding her "reasonable damages" of an amount "no less than" 2,000 German marks together with interest at the rate of 8 per cent per annum since the filing of the complaint;

(2) awarding her costs to the actually incurred amount of the related expenses of the proceedings.

8. No doubt the complainant's case was mishandled by the EPO. Its decisions to declare her absence as "unauthorised", to withhold her salary and to demand payment of contributions to the social security schemes, were declared unlawful by the EPO itself and it took the necessary measures to remedy the situation. Accordingly, the complainant did get her retroactive salary, was reinstituted into the social security schemes, and got her legal costs. Her complaint relates exclusively to the fact that she was not awarded damages.

9. However, the complainant was not entirely blameless. Once it was clear that there was a stalemate in the process for appointing the third member of the Invalidity Committee it was obvious that some solution had to be found. The Service Regulations were, at the material time, silent on the subject (a defect which has since been remedied) but virtually all codes of arbitration, both legislative and private, contain a procedure for having a court or other impartial third party appoint a third arbitrator in the case of deadlock. Once it had become clear that no third member could be appointed in the case at bar, it was entirely reasonable for the EPO to proceed by analogy to such codes. Both parties have now correctly retreated from their initial extreme positions.

As regards the complainant's claim for not less than 2,000 German marks, the Tribunal considers that she is entitled to 1,000 marks in moral damages for the unlawful actions of the EPO. She is also entitled to an award of costs which is set at 500 euros.

DECISION

For the above reasons,

1. The complaint is allowed.

2. The EPO shall pay the complainant 1,000 German marks in moral damages.

3. It shall pay her 500 Euros in costs.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 27 July 2001.