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

NINETY-FIRST SESSION

***In re* Borrelly** **Judgment No. 2063**

The Administrative Tribunal,

Considering the complaint filed by Mr Félix Borrelly against the European Patent Organisation (EPO) on 31 May 2000 and corrected on 11 July and the Organisation's reply of 6 October 2000;

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, a French citizen born in 1937, is a permanent employee of the European Patent Office, the secretariat of the EPO. On 17 July 1997, while on leave in France, he had to undergo an operation for a detached retina in his right eye at the University Hospital Centre in Nice. On 22 July the welfare officer of the hospital requested the Munich Office of the EPO by fax to cover the cost of a period of convalescence from 24 July in a convalescent home in Antibes. The insurance brokers, Van Breda, who are responsible for the day-to-day management of the collective insurance contract concluded by the EPO, refused the request by telephone. In a certificate sent to the Office by fax on 25 July, the doctor treating him at the hospital in Nice certified that the complainant's eye condition "ma[de] a long car journey inadvisable and that he require[d] one month's rest under regular supervision". The same day, after consulting its medical adviser, Van Breda confirmed its refusal in writing to the Office. The complainant was staying with his family in the Nice region, over 80 kilometres from an ophthalmologist's practice which he had to visit regularly. Shortly after his return to Munich, he had to undergo a second operation on his right eye.

By a letter of 15 December 1997, the complainant requested the President of the Office: (1) to ensure that Van Breda takes responsibility for the civil and penal consequences of its action; (2) to examine the "serious shortcomings" in the social coverage of EPO staff; (3) to condemn the practices of Van Breda; and (4) to compensate him for the physical and moral injury caused by the refusal to meet the cost of the care. If his request was rejected, his letter was to be treated as an internal appeal.

After obtaining explanations from Van Breda, the President informed the complainant, by a letter of 9 February 1998, of the grounds cited for the refusal to meet the cost of the care. Van Breda's medical adviser, after consulting an ophthalmologist, had considered that a stay in a convalescent home was not medically essential following an operation of the type undergone by the complainant. Indeed, a mere period of rest under medical supervision had been recommended by the doctor treating the complainant. Nevertheless, the President suggested that the opinion of the Office's medical officer should be sought and asked the complainant to contact the Administration for that purpose.

On 17 April the complainant replied that his internal appeal sought compensation, not explanations for the injury caused him by Van Breda's failure to comply with the terms of the insurance contract. In a letter of 30 April the Director of Personnel Development reminded him of the President's offer to consult the EPO's medical officer and, if he so wished, to challenge the latter's opinion before the Invalidity Committee. Pending a decision on the medical dispute, the Director proposed suspending the internal appeal. The complainant replied on 26 May that the legal issue, namely breach of the collective insurance contract, should be resolved first. Consequently, while agreeing to meet the medical officer, he asked for his appeal to be examined forthwith.

On 6 July 1998 the medical officer confirmed Van Breda's position and, on 8 July, the Director of Personnel Development asked the complainant whether he wished to refer the matter to the Invalidity Committee. On 27 August the complainant challenged the opinion of the medical officer on the grounds that it referred to laser treatment, whereas he had undergone a surgical operation. On 23 September 1998 the medical officer slightly modified her opinion, citing a certificate issued by the complainant's ophthalmologist on 5 December 1997 indicating that he had undergone "a double eye operation with extensive laser treatment".

On 7 October 1999 the Director of Personnel Development again asked the complainant whether he wished to press his appeal or refer the matter to the Invalidity Committee. The complainant replied on 28 October that he was maintaining his appeal. In an opinion dated 15 February 2000 the Appeals Committee, citing the Tribunal's case law, unanimously recommended the rejection of the appeal. By a letter of 8 March 2000, which is the impugned decision, the Principal Director of Personnel informed the complainant that, in accordance with the Appeals Committee's opinion, the President had rejected his appeal.

B. The complainant contends that Van Breda should not have sought a second medical opinion concerning his application for his costs to be met. He says that the relationship between him and Van Breda is governed by a contract which does not envisage a second opinion for a direct transfer after leaving hospital to an establishment that is under medical direction and supervision. The terms of the contract were therefore breached. Moreover, he submits that the case law to which the Appeals Committee referred is not applicable, as the circumstances of the case are different.

In subsidiary pleas he argues that, even if a second medical opinion were authorised, Van Breda should have found out about his state of health before issuing such an opinion. Since it did not, it must be held responsible for the consequences. Lastly, he asserts that, in finding that a stay in a convalescent home was not a medical necessity, Van Breda and the Appeals Committee misinterpreted the medical certificate issued by his doctor. It is customary in France to presume that a transfer request made by a hospital is justified.

The complainant asks the Tribunal to set aside the impugned decision and to award him 60,000 German marks in physical and moral damages, as well as costs.

C. In its reply the EPO contends that the complaint is partly irreceivable, as medical disputes lie within the jurisdiction of the Invalidity Committee, to which the complainant has hitherto constantly refused to refer the case. His only receivable plea concerns Van Breda's right to check the medical necessity of treatment for which reimbursement is requested.

The EPO recalls that the case law allows insurers to check whether treatment is appropriate and/or necessary, so there is no substance to the complainant's argument that the insurance contract contains no express provision to that effect. The evidence produced by the complainant fails to prove the need for a stay in a convalescent home. The original medical certificate recommending one month's rest specified only regular supervision. The EPO denies that Van Breda failed in its duty to find out about the state of the complainant's health: it obtained the opinion of its medical adviser and an ophthalmologist. Moreover, it is not bound by the national practice cited by the complainant.

CONSIDERATIONS

1. The complainant is a patent examiner at the European Patent Office in Munich. While on leave he was hospitalised on 17 July 1997 at the University Hospital Centre in Nice for a detached retina operation on his right eye. In a fax message of 22 July the welfare officer of the hospital requested the Office to meet the costs of admitting the complainant to a convalescent home in Antibes as from 24 July. Van Breda, the insurance brokers responsible for managing the collective insurance contract concluded by the Office under Article 83 of the Service Regulations, rejected the request by telephone on 24 July. The following day, the welfare officer sent the Office a certificate issued by the surgeon who had treated the complainant indicating that his eye condition "ma[de] a long car journey inadvisable and that he require[d] one month's rest under regular supervision". But the same day, citing the opinion of its medical adviser, Van Breda confirmed in writing its refusal to cover the costs of the complainant's stay in a convalescent home. The complainant says that he had been willing to bear his own costs, but was told that only patients covered by a health insurance scheme could be admitted to such an establishment.

He therefore stayed with relatives in the Nice region, which, on several occasions, meant travelling over 80 kilometres for the necessary post-operatory checks. After returning to Munich, he had to undergo a second operation on his right eye on 1 October 1997, his retina having become detached again.

2. In a letter of 15 December 1997 the complainant informed the President of the EPO of the conditions of his convalescence and requested him to ensure that Van Breda assumed civil and penal liability for the serious error he says it committed. He requested the EPO to use all legal means available to it to secure for him compensation for the physical and moral injury he suffered. He added that, if it did not accede to his claims, the Organisation should treat the letter as an internal appeal within the meaning of Articles 106 to 108 of the Service Regulations.

3. Following that request, the EPO referred the matter to Van Breda, which replied on 21 January 1998 that there were no medical grounds for authorising the complainant's admission to a convalescent home; after an operation such as his, it was enough to desist from heavy physical work. The President of the Office informed the complainant on 9 February of Van Breda's reply and offered to seek an opinion on this decision from the EPO's medical officer in Munich. On 30 April, while conceding that the Office was bound to insure its employees against the financial risks of sickness, the Director of Personnel Development informed the complainant that he was entitled to challenge Van Breda's refusal, that a decision would be taken on the basis of an opinion by the EPO's medical officer, and that the latter's opinion could be disputed before the Invalidity Committee. The complainant disagreed with that procedure, deeming that before any medical evaluation it should be determined whether Van Breda was, as he alleged, in breach of the collective insurance contract. He nonetheless agreed to meet the EPO's medical officer. On 6 July 1998 the latter indicated that it was "not absolutely essential to take specific measures for rest after laser treatment for a detached retina", and concluded that "it [could] not be confirmed that Mr Borrelly's post-operatory stay in a convalescent home was absolutely necessary". That conclusion was slightly modified on 23 September 1998, the complainant having emphasised that he had undergone "a surgical operation and not laser treatment". As a result the complainant requested referral of his appeal to the Appeals Committee.

4. The Appeals Committee issued its opinion on 15 February 2000. It found the appeal receivable, contrary to the Administration's assertion that it should have been referred only to the Invalidity Committee, as it did not challenge the refusal to reimburse the expenses, but sought compensation for the injury caused by the refusal to meet the cost of the stay in a convalescent home. The Appeals Committee, however, considered that the appeal could not be upheld on the merits, since decisions taken on the basis of medical opinions are subject to only limited review; Van Breda's decision not to meet the cost of the complainant's admission to a convalescent home showed no mistake of law or of fact and no procedural flaw. It added that only the Invalidity Committee was competent to decide whether admission to a convalescent home was necessary for his recovery and whether there was a causal link between the alleged mistake by Van Breda and the injury suffered. Endorsing that opinion, the President of the EPO rejected the internal appeal in a decision of 8 March 2000.

5. The complainant has three pleas in support of his complaint against that decision. First, Van Breda lacked authority to review the medical opinion by his surgeon indicating the need for rest. Secondly, the Appeals Committee, whose opinion was endorsed by the President of the EPO, was mistaken in finding that Van Breda's decision not to seek further medical advice and not to request the report on the operation was justified by the urgency of the situation. Lastly, the conclusion that a stay in a convalescent home was not a medical necessity was a misinterpretation of the medical opinion indicating the need for rest.

6. In rebuttal, the EPO argues that the complaint is partly irreceivable as some of the pleas show a disagreement about medical assessments which can only be resolved through consultation of the Invalidity Committee. It is thus receivable only insofar as it challenges Van Breda's right to ascertain the medical necessity of the care for which reimbursement is claimed.

7. The Tribunal shares that view. Article 90 of the Service Regulations, which is relevant to this case, does indeed provide that the Invalidity Committee shall be competent "to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner". Despite the invitation to do so, the complainant has still not seen fit to refer to the Invalidity Committee the medical issues raised by his appeal.

8. However, as acknowledged by the EPO, the Tribunal is fully competent to consider whether the Office is right in maintaining that Van Breda correctly exercised its authority in rejecting the request to meet the cost of transferring

the complainant to a convalescent home. Clearly, the authority of the insurance brokers goes beyond a simple right to make an administrative check of the claims it receives. As the Tribunal held in Judgment 1288 (*in re* Fessel), "the insurers are entitled to information which identifies the nature of the ailment and enables them to determine whether the prescribed treatment is appropriate" and, more generally, have the right to check whether, under the insurance contract, they are liable for the costs of the care dispensed. But they must so exercise that authority as to provide the insured with a guarantee that their claims to coverage are examined with all due care. That was not the case here. Van Breda received a fax from the hospital's welfare officer seeking coverage of the complainant's convalescence in a home following a serious operation. Its only response was to reject the request out of hand by a mere telephone call. It neither inquired further as to the state of his health nor asked to see the report on his operation. And in reply to an inquiry from the EPO after the latter received the certificate from the complainant's doctor prescribing one month's rest and regular supervision, Van Breda simply referred to the opinion of its medical adviser, without so much as an indication of why it rejected the claim. It would also appear that the complainant's operation was underestimated, since the EPO's medical officer states in her opinion of 6 July 1998 that the complainant simply underwent "laser treatment for a detached retina", so it was not "absolutely necessary" for him to convalesce in an institution. But on 23 September 1998, having re-examined the available documents and the complainant's statements to the effect that he had undergone "emergency cryotherapy", she slightly modified her assessment of the treatment undergone in July 1997. In view of the absence of serious grounds for refusing to cover the cost of the care and the fact that the uncertainty could have been resolved by consulting the surgeon or the report on the operation, the Tribunal finds that the EPO, which is liable for the acts of Van Breda, failed to deal with the matter with all due care and to afford the complainant all the attention he was entitled to expect. It must therefore assume responsibility for an error for which the complainant rightly seeks compensation.

However, in order to assess any physical injury suffered by the complainant, it is necessary to ascertain the later consequences for his health of the refusal to meet the costs of his admission to a convalescent home, and the fact that he did not as a result stay in such a home. These are purely medical matters which, as indicated above, need to be referred to the Invalidity Committee as the EPO proposed.

Nevertheless, the Organisation being at fault, the complainant's claim to redress succeeds in part. Although he cannot at present show any injury from the deterioration in his state of health, he is entitled to an award of moral damages, which the Tribunal sets at 3,000 euros.

9. Since his complaint succeeds in part, he is also entitled to costs, in an amount of 3,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 3,000 euros in moral damages.

2. It shall pay him 3,000 euros in costs.

3. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

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