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

NINETY-SIXTH SESSION

Judgment No. 2271

The Administrative Tribunal,

Considering the complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 13 November 2002 and corrected on 2 December 2002, the EPO's reply of 10 March 2003, the complainant's rejoinder of 16 June and the Organisation's surrejoinder of 19 September 2003;

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

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

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

A. The complainant, a French national born in 1961, joined the European Patent Office, the EPO's secretariat, in 1985. At the material time he was assigned to the Vienna sub-office as an administrative employee in the CD-ROM Invoicing and Subscription Unit. Owing to the complainant's prolonged absences on sick leave, the Office transferred another staff member - Mr B. - to his post on a temporary basis at the start of the year 2000. In April, the complainant sent the EPO three medical certificates recommending that he be reassigned to a different post. In December 2000 the EPO informed Mr B. that his temporary assignment had been made permanent. As indicated in Judgment 2191, delivered on 3 February 2003, the latter challenged the decisions to transfer him.

At the end of April 2001 the complainant was informed by Mr B. that, in the course of the latter's internal appeal procedure, the Administration had produced the three above-mentioned medical certificates. In a letter dated 3 May 2001 the complainant asked the President of the Office to have the certificates withdrawn from the file concerned and from any other file where they had no reason to be. In the event that his request was rejected, he wished his letter to be considered as initiating an internal appeal. Such was the case and the Appeals Committee unanimously recommended rejecting the appeal in its opinion dated 12 July 2002. By a letter of 9 August 2002, which constitutes the impugned decision, the complainant was informed that the President had decided to reject his appeal.

B. Citing the Tribunal's case law, the complainant argues that the Organisation did not have the right to divulge medical certificates that concerned him to third parties without his consent and that, in doing so, it had failed in its duty to protect the privacy of its staff members. According to him, there were other documents, of an administrative and non-confidential nature - such as the record of his absences or copies of his unit's activity reports - which might have been used instead to support the Administration's case in the internal appeal filed by his colleague. In response to the Administration's argument that his colleague may have had free access to the documents produced when he worked in personnel, the complainant recalls that the documents were issued after the challenged transfer, so that they were not relevant to that case. He considers that the Appeals Committee was wrong in asserting that the medical certificates gave no details regarding his state of health or any diagnosis. Noting that one of the certificates gave the opinion of a psychologist, he maintains that the Committee is not competent to judge whether the medical details which were revealed were important or not.

The complainant seeks the quashing of the impugned decision, the token payment of one euro in damages, a letter of apology and the publication by the EPO of a general text regarding the obligation to respect medical secrecy.

C. In its reply the EPO argues that the complaint is partially irreceivable on the grounds that the Tribunal is not competent to order the defendant to submit an apology.

On the merits, it argues that, since there was no glaring error or contradiction in the Appeals Committee's opinion, the President had no reason not to endorse it. According to the EPO, the procedure followed was implicitly approved in the Tribunal's Judgment 2191, since the question of the lawfulness of producing the disputed medical certificates had already been raised in Mr B.'s case.

Furthermore, it argues, firstly, that these documents had to be submitted to the Appeals Committee, since, according to Article 113(1) of the Office's Service Regulations, all the material necessary for the investigation of the case shall be provided to the Committee. As it turned out, the Committee recognised in its opinion that the certificates were relevant to the appeal procedure, precisely since the complainant's state of health had been the reason put forward by the Principal Director of the Vienna sub-office to justify Mr B.'s transfer. The record of absences concerning the complainant was not the document on which the decisions challenged by Mr B. had been based, and, besides the fact that the print also contained confidential information, it did not give the key information showing why the complainant's transfer was necessary. Secondly, Article 113 of the Service Regulations, in order to guarantee the adversarial nature of the appeal proceedings, provides that the papers submitted to the Appeals Committee shall also be transmitted to the appellant. According to the EPO, sending the medical certificates in question to Mr B. was not likely to cause any harm to the complainant. The Committee noted that the information provided was not "strictly speaking" medical. Thirdly, there was no need to obtain the consent of or to inform the staff member concerned beforehand, since there was no provision to that effect in the Service Regulations. Moreover, the medical information contained in the certificates was minimal and had been disclosed on a strictly confidential basis, by which Committee members were bound (Article 110(2) of the Service Regulations), as was indeed the appellant (Article 20(1)).

D. In his rejoinder the complainant argues that the EPO is mistaken in relying on Article 20 of the Service Regulations. This article concerns information obtained by an employee in the performance of his duties, which is not the case when an appeal is lodged by a staff member, a former staff member or a person entitled to claim on their behalf. He adds that the appeal procedure is not strictly confidential, as suggested by the defendant. Moreover, the documents produced were not essential for the Office's defence in the case of Mr B.'s appeal. Whereas the Administration argued that the latter was transferred because of the complainant's prolonged absences, the three medical certificates are chiefly concerned with the need to reassign the complainant and hardly mention his sick leave. As for Judgment 2191, the complainant argues that, far from endorsing the procedure followed by the EPO, it shows that the Tribunal did not need the documents in question in order to arrive at a ruling. Lastly, the complainant maintains that the Organisation's attitude amounts to a violation of human rights.

E. In its surrejoinder the Organisation notes that it has not been accused of divulging the confidential information in question outside the internal appeal procedure initiated by Mr B. The fact that the information might have been divulged does not constitute "a present, certain and direct injury" for which compensation may be claimed. With regard to whether Article 20 of the Service Regulations is relevant or not, it points out that the Tribunal has ruled that an official of an international organisation remains bound by the duty of discretion even during an appeal procedure. The issue of whether this duty might have been breached by persons no longer or not employed at the EPO does not arise in the present case. The complainant has therefore not demonstrated that the Organisation fails to meet its obligations with regard to the confidentiality of internal appeal procedures. It reiterates that Mr B.'s assignment to the complainant's post was justified by the latter's absences and by the fact that he would not be able to resume his duties. It denies any violation of human rights and believes it acted for the best by taking account of both the personal interest of the complainant and the statutory obligations of the Organisation in internal appeal procedures.

CONSIDERATIONS

1. At the beginning of the year 2000, the complainant, an EPO administrative employee currently assigned to Munich, was working in the CD-ROM Invoicing and Subscription Unit at the Vienna sub-office. Because he was frequently absent on sick leave, the Office decided to transfer another staff member, first on a temporary and then on a permanent basis, to his post. The staff member concerned brought an internal appeal against his transfer and then challenged the rejection of his appeal by the President before the Tribunal. In Judgment 2191 the Tribunal held that, whereas the staff member's temporary assignment had been legally justified, his permanent transfer was

not, since the post concerned was not vacant. During the internal appeal procedure, the Organisation had considered it necessary to produce three medical certificates in order to show that the incumbent of the post to which the staff member concerned had been transferred, would probably never be able to return to that post.

2. When he was informed that the three medical certificates had been produced in the course of the internal appeal concerning his colleague's transfer the complainant, whose replacement, according to the Organisation, was justified by his absences, lodged an appeal on 3 May 2001 with the President of the Office requesting that those papers be removed from the file in question and from any other administrative files "where they [had] no reason to be". It was replied, on behalf of the President, that the production of disputed documents had been procedurally correct and could not have caused him any injury. The Appeals Committee, to which the case was referred, considered in its opinion of 12 July 2002 that the disputed documents, which the Office had received in its capacity as employer, needed to be produced for the investigation of the case, and that they had been transmitted to members of the Appeals Committee and to the appellant in accordance with applicable rules, in particular Article 113(1) and (4), of the Office's Service Regulations. The Committee added that the information, which was not "strictly speaking" medical, merely confirmed that there was a link between the complainant's health problems and his position at work and its disclosure to a limited number of recipients had been justified "in order to ensure that the appeal procedure complied with the rules". On 9 August 2002 the complainant was informed that the President had decided to follow the Committee's unanimous opinion and to reject the appeal.

3. The Tribunal is asked to set aside that decision. The complainant also requests a written apology from the Organisation, the publication of a general text concerning the obligation to respect medical secrecy and the token payment of one euro in damages.

4. The claims for the Organisation to apologise and to publish a general text - which are worded somewhat ambiguously - must be dismissed. Consistent precedent has it that it is not for the Tribunal to issue such instructions to the authorities of an international organisation.

5. On the other hand, the claims for the decision to be set aside and for damages are receivable. The complainant argues that, whereas it was normal that the certificates recommending his transfer should be made available to the Administration, the confidential information they contained could not be disclosed to third parties without breaching his right to privacy, which must be protected according to the general principles of law. The defendant considers for its part that the disputed documents needed to be submitted to the Appeals Committee, in compliance with Article 113(1) of the Service Regulations, because they constituted "material necessary for the investigation of the case", and that they also needed to be transmitted to the appellant by virtue of the principle of adversarial proceedings, without the consent of the staff member referred to in the certificates. The defendant adds that the medical information contained in the certificates is in fact "minimal" and that the appeal procedure is confidential. It points out that the Tribunal, in its Judgment 2191, had not found the disclosure of the disputed certificates at all questionable.

6. On this latter point, the Organisation's argument does not stand. The question of whether the production of the complainant's medical certificates was lawful or not could not be decided in Judgment 2191, which merely recalled the principle that "[o]rganisations must carefully take into account the interests and dignity of staff members", and which set aside the challenged decision for reasons which had nothing to do with the fact that the certificates had allegedly been wrongfully disclosed. The Tribunal therefore did not settle the present matter, either explicitly or implicitly.

7. The confidential nature of medical information concerning the state of health of staff members constitutes a key element of their right to privacy. It is no doubt both necessary and legitimate for an international organisation, like any employer, to investigate requests for sick leave, to examine medical certificates and to have the health of its staff members checked by appropriate means. Such information should be gathered and processed on a fully confidential basis, however, and should never be communicated to third parties without the explicit consent of the person concerned. In the present case, the defendant is not wrong to point out that the three certificates, which have been included in the file on which the Tribunal must give a ruling, contain no information that in any way describes the disorders affecting or having affected the complainant. Nevertheless, in order to justify the change of post recommended by the authors of the three certificates, some precise details are given which the Tribunal considers are related to the complainant's private life. The latter had at no stage been asked, however, if he consented to the information being divulged. The fact that the members of the Appeals Committee are bound by an obligation of confidentiality does not mean that information covered by medical secrecy can be disclosed to them

without the consent of the persons concerned. Furthermore, the fact that the originator of the internal appeal, who had himself worked in personnel until he was transferred, could not have been unaware of the complainant's health problems or of his own obligation to treat such matters confidentially, cannot in itself justify a breach of the guarantees to which international officials are entitled.

8. In the circumstances, the Tribunal considers that the President was wrong to refuse to withdraw the three certificates in question from the file submitted to the Appeals Committee; it sets aside the decision of 9 August 2002 confirming that refusal. Since the complainant's claim for token compensation is limited to one euro for the moral injury he considers he suffered, the Tribunal is willing to allow this claim.

DECISION

For the above reasons,

1. The decision of the President of the Office of 9 August 2002 is set aside.

2. The Organisation shall pay the complainant token damages of one euro.

3. All other claims are dismissed.

In witness of this judgment, adopted on 19 November 2003, 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 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.