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

NINETY-NINTH SESSION

Judgment No. 2432

The Administrative Tribunal,

Considering the complaint filed by Ms C.M.J.M.P. against the European Patent Organisation (EPO) on 6 May 2004 and corrected on 30 June, the Organisation's reply of 14 October 2004, the complainant's rejoinder of 25 January 2005 and the EPO's surrejoinder of 31 March 2005;

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. Article 62(7) of the relevant version of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO, provides as follows:

"If, at the expiry of the maximum period of sick leave [...], 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 [...]. 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."

The complainant, a Belgian national born in 1964, joined the Office on 1 May 2000 as an examiner. She currently holds grade A2.

After she had taken 189 days of sick leave between 5 June 2000 and 16 August 2002, the President of the Office decided to have her medically examined by the Office's medical adviser, Dr G., in order to assess her ability to perform her duties, in accordance with Article 26(2) of the Service Regulations. The medical adviser concluded on 27 January 2003 that she was not fit for work but that she would be able to resume work after six weeks, on a 50 per cent basis for one month and then 75 per cent for the following month.

In a letter of 4 June 2003 the complainant was informed that she had reached the maximum period of paid sick leave provided for in Article 62 of the Service Regulations and that an invalidity procedure would be initiated in accordance with paragraph 7 of that article. As the complainant was suffering from both gynaecological and orthopaedic disorders, the Invalidity Committee was made up of one gynaecologist chosen by the complainant – Dr H., her own regular practitioner – and two orthopaedists – namely the Office's medical adviser, who was appointed by the President of the Office, and a practitioner chosen by agreement between the first two (Dr O.). Having examined the complainant on 28 July, the medical adviser stated in a report of 30 July that she could continue to perform her duties as an examiner on a 50 per cent basis until 24 August and then on a 75 per cent basis until 20 September 2003. The complainant was then examined on 30 October by Dr O., who found in his report of 17 November that she was not suffering from "an illness/disability" comparable in seriousness to cancer, tuberculosis, heart disease, poliomyelitis, or neurological or mental illnesses. Dr H., on the other hand, stated in his report of 6 December 2003 that the complainant, having been through a serious illness, was henceforth entirely fit for service.

The members of the Invalidity Committee filled in a form serving as a report, which they signed on 5, 7 and 14 January 2004 respectively. On the basis of their above-mentioned individual reports, inter alia, they concluded unanimously that the complainant's sick leave had ended on 23 September 2003, that she was able to perform all the tasks expected of an examiner and that "[i]t [was] not a case of an illness/disability comparable in seriousness to cancer, tuberculosis, heart disease, poliomyelitis or neurological or mental illnesses". It was also specified in the report that the Committee had not held any meeting. Under cover of a letter of 9 February 2004 the Head of the

Personnel Administration Department sent the complainant the Invalidity Committee's report. He informed her that the provisions of the Service Regulations concerning sick leave and invalidity had been amended with effect from 1 January 2004 and that she would shortly be notified of the possible effects of the new regulations on her remuneration.

On 19 February the complainant filed an appeal against the decision sent to her by the letter of 9 February 2004 which she received on 11 February. She was informed in a letter of 30 March that the President of the Office, on the grounds that the statutory provisions concerning extended sick leave had been correctly applied, had not accepted her appeal and that the matter had been referred to the Appeals Committee for an opinion. The complainant impugns the Invalidity Committee's "decision" of 14 January 2004 as conveyed to her in the above-mentioned letter.

B. The complainant contends that Article 62(7) of the Service Regulations and Article 90(1) concerning the duties of the Invalidity Committee were breached insofar as the Committee was in this case set up too late. She objects to the fact that the Committee did not meet, that it included only one gynaecologist whereas her illness was chiefly gynaecological and that the medical examinations took place long after her operations. She blames the administration for procedural errors, because certain documents were sent to the practitioners too late, and she complains that she was unable to consult the whole of her "personal file".

She notes that the Office's medical adviser did not hand in a detailed report leading to a conclusion regarding the seriousness of her illness and that he omitted to refer to certain documents concerning operations she had undergone in the past. She considers that the report by Dr H., who as her regular practitioner should have informed the Committee of the impact of the gynaecological problems on her general state of health, was incomplete, covering only the period after April 2002, and that it was inconsistent with the Committee's report, which nevertheless he signed. She blames Dr O. for having expressed his views concerning the seriousness of her illness even though he had acknowledged that he was not qualified to judge gynaecological matters, and for having lacked objectivity as a result of slight disagreements which had arisen between them at the time she had arranged an appointment for her medical examination.

The complainant asks the Tribunal to set aside the "impugned decision" and to order that the matter be referred back to the Invalidity Committee for an opinion as to whether her incapacity to perform her duties during the period concerned resulted from a serious illness in the meaning of Article 62(7) of the Service Regulations in force until 31 December 2003. According to her, the Committee should "split into two different groups to consider the serious illness question separately from the orthopaedic and from the gynaecological points of view". She claims 10,000 euros in moral damages.

C. The Organisation points out that the invalidity procedure was initiated when it appeared that the complainant would not resume her duties by the planned date. It recognises that, in view of the fact that an Invalidity Committee is convened only once the period of paid sick leave has expired, some time will have passed between the events giving rise to the sick leave and their assessment by the Committee. In the event, however, the Committee referred to many medical documents, which are listed in its report, and the complainant had the opportunity to state any facts she wished. The defendant recalls that Dr O. was selected by common agreement between the practitioner appointed by the Office and the one chosen by the complainant, and that the latter did not object to their choice of an orthopaedist. Furthermore, the members of the Committee – who under the terms of Article 92 of the Service Regulations are free to decide how they arrive at their conclusions – did not consider it necessary to meet, nor did the practitioner chosen by the complainant express any comments on the Committee's opinion. The defendant denies that certain documents were sent to the practitioners too late.

The Organisation considers that there is no inconsistency between the conclusions given in the report of the complainant's regular practitioner, stating that she had been seriously ill, and the fact that he signed the report stating that she did not suffer from a serious illness in the meaning of the Service Regulations. Moreover, since the members of the Committee are responsible, inter alia, for assessing whether periods of sick leave are consistent with the state of health of the staff member, Dr H. performed his duties as a member of the Committee correctly by considering that he had to refer to the period 4 April 2002 to 21 March 2003. The defendant points out that Article 92 of the Service Regulations does not require a detailed report. In its opinion, moreover, the initial misunderstanding concerning the complainant's appointment with Dr O. was not such as to cast doubts on the latter's objectivity. The fact that Dr O. stated that he was not qualified to give an opinion on gynaecological matters does not mean that he could not express his views as orthopaedist concerning the seriousness of her disorders.

D. In her rejoinder the complainant expresses surprise at the fact that she was not informed before the end of her paid sick leave that the maximum number of days allowed was about to be reached. She adds that she was unable to see the whole of her "medical file". Yet it appears from information concerning the procedure before the Invalidity Committee that a permanent employee is entitled to consult medical documents concerning the procedure as soon as it has ended.

The complainant believes that according to Articles 62 and 90 of the Service Regulations the Invalidity Committee must give an opinion on the period of extended sick leave. She points out that Dr O. assessed her condition at the time he examined her, that is, when she was back working full time, that the medical adviser appears to have given his opinion concerning the period of sick leave and that Dr H., when the Committee's report was signed, assessed her condition for a period which was not the same as that to which he had referred when drafting his own report, as is shown by a letter he wrote on 14 January 2005. The Invalidity Committee itself gave an opinion on her condition at the time it filled in the form. Since the Committee based its views on reports concerning different periods, its decision is open to doubt.

The complainant regrets the fact that the concept of a serious illness is nowhere clearly defined. According to Article 62(7), an illness is considered to be "serious" if it is equivalent to one of those listed, the significant factor being, in her view, the nature of the illness and not the resulting degree of incapacity. However, according to the form they have to fill in, the members of the Invalidity Committee have to decide whether it is a case of "an illness/disability comparable in severity" to one of the illnesses listed; this means that they have to take account not only of the seriousness of the illness but also of its consequences. According to the complainant, Dr H. based his assessment on Article 62(7), while Dr O. referred to the definition used in the form. She recalls that the Tribunal considered in its Judgment 2358 that ambiguities must be resolved in the manner most favourable to staff members and that given the ambiguity in Article 62(7), that provision should be interpreted so that the cause of disability is of less significance than its gravity.

E. In its surrejoinder the Organisation maintains that the procedure before the Invalidity Committee was conducted with due diligence and that the Committee took account of all aspects of the complainant's sick leave. With regard to her access to the medical file, the defendant asserts that the complainant was asked to contact the medical practitioners concerned, since the medical reports were not available at the Office.

The Organisation rejects the complainant's argument that the practitioners took different periods into consideration. As for the suggested inconsistency between the definition of serious illness given in Article 62(7) of the Service Regulations and that appearing on the form containing the opinion of the Invalidity Committee, that issue was not raised either by the practitioners at the time the report was drafted or by the complainant in her complaint brief, which was in any case filed before the delivery of Judgment 2358, on which she therefore cannot rely.

CONSIDERATIONS

1. In her complaint before the Tribunal, the complainant impugns a "decision" of 14 January 2004 which was notified to her on 11 February 2004 and which is contained in the report of the Invalidity Committee.

It was on 14 January 2004 that the last signature was added to the form constituting the Invalidity Committee's report and it was on 11 February 2004 that the complainant was notified of the form, by letter of 9 February.

The complainant asks the Tribunal to set aside the impugned decision and to send the case back to the defendant for the matter to be referred once again to the Invalidity Committee. She claims 10,000 euros in moral damages.

In support of her complaint, she contends that rules have been breached regarding the convening of the Invalidity Committee, the composition of the Committee and the procedure before it. She complains about each of the members of the Committee, the assessment of her illness and the administrative management of the procedure before the Committee.

The defendant calls for the complaint to be dismissed as unfounded.

2. The texts that apply in this case, as they stood when proceedings were initiated before the Committee, read as follows:

Article 62(6) and (7) of the Service Regulations:

"(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 [...]. 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 90(1):

"The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave provided for in Article 62, paragraph 6 [...]."

Article 92:

"(1) The permanent employee may submit to the Invalidity Committee any reports or certificates from his regular medical practitioner or from other practitioners he has consulted.

(2) The Invalidity Committee's decision shall be transmitted to the President of the Office and to the employee.

(3) The Invalidity Committee's proceedings shall be secret."

3. The Tribunal has consistently held that it may not replace the findings of medical boards with its own. But it does have full competence to say whether there was due process and whether the reports used as a basis for administrative decisions show any material mistake or inconsistency, or overlook some essential fact, or plainly misread the evidence (see Judgment 2361, under 9).

4. In this case, the complainant contends inter alia that the Invalidity Committee never met, despite the fact that a meeting appeared essential in view of the diversity of her illnesses and especially the inability of the orthopaedists to assess the gravity of her gynaecological problems and that of the gynaecologist to judge her orthopaedic problems. She submits that Dr H.'s report is inconsistent with the conclusions of the Invalidity Committee's report which he signed. She points out that the medical examinations before the Invalidity Committee took place long after her operations, that there was no detailed report regarding the seriousness of her illness by Dr G., that Dr O. examined her only a long time after her various orthopaedic operations and was not therefore qualified to judge her state of health during the period of her illness, that the same practitioner had acknowledged that he was unable to assess the seriousness of the gynaecological problems and was not therefore in a position to issue an opinion on the subject, and that Dr H.'s report is incomplete, since it covers only the period after April 2002 and is restricted to gynaecological problems. The defendant replies that there was no need to convene a meeting of the Committee members and that there is no evidence on file that the member appointed by the complainant ever made such a request.

5. The Tribunal takes the view that, before taking a final decision, any collegiate body must meet to deliberate. A meeting may not be absolutely necessary, however, as suggested in the form prepared in this case by the Organisation – which constitutes the Invalidity Committee's report – if the Committee members agree on all the points of their individual reports.

In this case, in view of the uncertainty regarding the period referred to in assessing the seriousness of the complainant's illness, of the fact that she was suffering from afflictions requiring treatment by different medical specialists and of the differences of opinion which emerged regarding the seriousness of the illness and the incapacity it caused, the Tribunal considers that the Invalidity Committee should have met before issuing its final decision. Since no meeting took place, the procedure leading up to the impugned decision is flawed even though the practitioner appointed by the complainant did not raise any objection. The decision must therefore be set aside and the case sent back to the Organisation for reconsideration of the question of whether the complainant's

incapacity to perform her duties during the period in question was the result of a serious illness in the meaning of Article 62(7) of the Service Regulations in its version in force prior to 1 January 2004.

6. The complainant claims compensation of 10,000 euros in moral damages. The Tribunal agrees that she suffered moral injury as a result of the illegality censured in this judgment, which may be fairly compensated by an award of 1,000 euros.

7. As she succeeds, the complainant is entitled to costs, which are set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is sent back to the Organisation for reconsideration of the rights of the complainant as explained under 5, above.

3. The EPO shall pay the complainant compensation of 1,000 euros for moral injury.

4. It shall also pay her 2,000 euros in costs.

In witness of this judgment, adopted on 28 April 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.