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

101st Session **Judgment No. 2537**

The Administrative Tribunal,

Considering the second complaint filed by Mr G.L.N. N. against the European Patent Organisation (EPO) on 3 March 2005, the Organisation's reply of 13 June, the complainant's rejoinder sent on 23 July and the EPO's surrejoinder of 26 October 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. The complainant, a citizen of Luxembourg born in 1951, joined the European Patent Office, the secretariat of the EPO, in November 1991 as a translator (terminologist). Details of his career are to be found in Judgment 1590, delivered on 30 January 1997, concerning the complaint he filed against the decision of the Director of the Language Service to reassign him to the French section of the service as a translator and to transfer his terminology duties to one of his colleagues.

The complainant's state of health started to deteriorate in 2001, which led to many absences on sick leave. On 4 July 2002 the Office informed him that he had exhausted his entitlement to sick leave and that an Invalidity Committee would be convened, in accordance with Article 89 of the Service Regulations. The Committee issued its report on 21 January 2003, in which it concluded that the complainant would be able gradually to take up his duties again from 1 February 2003, which he did. But after he had been kept in hospital from 22 March to 10 May 2004, a psychiatrist concluded that the complainant was unable to perform his duties and that a return to work might cause a relapse of his health problems. The Organisation again decided to convene a Medical Committee (the new name given as from 1 January 2004 to the body referred to in Article 89). This Committee was made up of Dr G., the Office's medical officer, and Dr M., the complainant's regular medical practitioner. In their report, a multiple-choice form which they signed on 12 and 17 November 2004 respectively, the two doctors concluded that the complainant suffered invalidity owing to a serious chronic illness and that it was unlikely that he would be able to take up his duties again for any length of time. The box opposite the sentence "[i]n the doctors' view the invalidity is not an occupational disease [...]" was ticked, but the complainant's regular medical practitioner had originally appended a note to the form stating that:

"The invalidity of Mr N[.] is not in doubt.

Its occupational origin may not, however, be totally excluded.

I would like this point to be taken into consideration before the final decision is taken."

On the report form, however, the reference to this note was crossed out and a footnote, dated 26 November and signed by two staff members of the Office, indicated that Dr M. had withdrawn his additional comments in the course of a telephone call. By decision of 3 December 2004, which is impugned by the complainant, the President of the Office decided to grant him an invalidity pension as from 1 December 2004. On 9 December the complainant was informed of the rate of the said pension, which corresponded to invalidity of non-occupational origin.

B. According to the complainant, both the deterioration of his state of health and the worsening of his working conditions after 2001 were due to the appointment of a new head of the French section of the Language Service, and to the harassment to which he was subjected. He points out that a direct causal link between his working conditions and his health problems has been established in several medical certificates issued by different doctors. He notes that, while the two members of the Medical Committee agreed that he was permanently unfit for work, they disagreed on the question of whether or not his invalidity was due to an occupational disease and he expresses

surprise that they did not, in the circumstances, call on a third medical practitioner to decide the issue, as stipulated in Article 89(1) of the Service Regulations. He maintains, moreover, that the Office's medical officer should have given reasons for his opinion, as requested in the report form.

He accuses the EPO of having interfered in the Committee's proceedings by bringing direct pressure to bear on one of its members to make him change his opinion, thereby violating medical confidentiality, abusing its authority and invalidating the whole of the committee's report in its version of 26 November 2004. He points out that the "so-called withdrawal" by Dr M. of his additional comments was not made in writing, as would have been required by the principle that similar acts require similar procedures, so that it has not been established that the withdrawal actually occurred. The complainant contends that the impugned decision is not substantiated because it does not give the date of the Medical Committee's report on which it is based (whether the original dated 17 November 2004 or the amended version dated 26 November); nor does it state whether the invalidity concerned is of occupational origin or not.

The complainant asks the Tribunal to set aside the impugned decision as unlawful, on the grounds that it does not recognise the occupational origin of his invalidity, and to order a legal reclassification of his illness. Subsidiarily, he asks for an expert to be appointed in order to give an opinion on whether his invalidity is of occupational origin. On a very subsidiary basis, he asks for the case to be referred back to the Organisation for a new Medical Committee to be appointed. Whatever the outcome, he claims 20,000 euros in compensation for injury and 5,000 euros in costs.

C. In its reply the Organisation contends that there is no evidence in this case of a causal link between the complainant's illness and his duties. It argues that according to the Pension Scheme Regulations occupational disease is considered an exception to the rule. In its view the origins of the complainant's illness should be sought more in his personality than in his working conditions.

With regard to the Medical Committee's report, it points out that Dr M. did not disagree with the medical practitioner appointed by the Office. If he had disagreed, he would not have signed the report. He simply noted that an occupational origin could not be "totally excluded" and asked the Organisation to take account of that fact. The Administration was therefore right to ask the doctor to explain his note, and the fact that he authorised its deletion shows that he agreed with Dr G.'s conclusions.

D. In his rejoinder the complainant objects to the EPO's statement regarding the origin of his illness. He refers to several medical certificates which establish a link between his state of health and his work.

The complainant once again brings up the issue of Dr M.'s additional comments. There is no doubt in his mind that by these comments the doctor intended to express disagreement with his colleague's views as to whether or not the illness leading to his invalidity was of occupational origin. The Administration's reaction on receiving the comments shows clearly that the doctor had not intended to express agreement. He accuses the defendant of distorting the meaning of those comments and more generally of showing bad faith in its presentation and interpretation of the facts. He reiterates that a third medical practitioner should have been appointed. He points out that there are no statutory provisions that regulate the procedure of the Medical Committee and that the document produced by the defendant entitled "Conduct of the proceedings before the Medical Committee", to which it refers several times as being the Committee's "rules of procedure" and which it supposedly had Dr M. sign on 25 August 2004, is unknown to him and goes well beyond what is provided for in the Service Regulations. Lastly, he considers the explanations given by the defendant regarding the said doctor's withdrawal of his additional comments by telephone to be "implausible".

E. In its surrejoinder the EPO argues that the medical opinions issued prior to the Medical Committee's report do not confirm that the complainant's illness was of occupational origin. It maintains that by drafting the rules contained in the document describing the procedure before the Medical Committee, it was merely exercising its implicit right to issue administrative rules, in this case to define the way in which Article 92(2) of the Service Regulations is to be implemented in order to help medical practitioners appointed to the Committee to understand the statutory provisions.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 November 1991. After being initially assigned to the Language Service of Directorate-General 4 in Munich as a translator (terminologist), he was subsequently transferred to the French section as a translator, a measure which gave rise to proceedings leading to Judgment 1590.

From 2001 onwards the complainant's state of health gradually deteriorated. From 5 June 2001 to 4 June 2004 the Office recorded 730 days of absence for health reasons.

2. On 4 July 2002 the Office informed the complainant that he had reached the maximum number of days of sick leave to which he was entitled and that it had been decided to convene an Invalidity Committee. The latter found that the complainant could gradually return to work starting on 1 February 2003, which he did under the same working conditions as before.

As the complainant's work capacity did not improve, the Office decided on 19 May 2004 to have him examined by a new Invalidity Committee (now known as a Medical Committee). This Committee was made up of a medical practitioner appointed by the Office, who had already served on the first Invalidity Committee (Dr G.) and a psychiatrist practising in Luxembourg, appointed by the complainant (Dr M.).

The Committee handed in its conclusions in November 2004. The report – set out on an official multiple-choice form – was signed by Dr G. and Dr M. on 12 and 17 November 2004, respectively. It states that the complainant suffers invalidity owing to a serious chronic illness, that it is unlikely that he will be able to take up his duties again for any length of time and that, in the doctors' view, the invalidity does not arise from an occupational disease in the meaning of Article 14(2) of the Office's Pension Regulations.

The medical practitioner appointed by the complainant attached the following handwritten statement* to the report:

"Luxembourg, 17 November 2004

Concerning: proceedings before the Medical Committee in the case of Mr N[.] G[.] [...]

The invalidity of Mr N[.] is not in doubt.

Its occupational origin may not, however, be totally excluded.

I would like this point to be taken into consideration before the final decision is taken."

At the foot of the report, the following handwritten note appears next to an asterisk:

"Over the telephone Dr M[.] withdrew his additional comments. They therefore no longer form part of the above opinion."

This note, dated 26 November 2004, is signed by two members of the Office's staff, namely the Director of Personnel Administration and a human resources consultant in charge of the case.

3. By letter of 29 November 2004 the Director of Personnel Management and Systems informed the complainant of the conclusions reached by the Medical Committee and of the resulting decision taken by the President of the Office to terminate his service as from 1 December 2004 and to grant him an invalidity pension within the meaning of Article 54(2) of the Service Regulations. The President's decision, dated 3 December 2004, was formally notified to the complainant on 8 December.

4. For his main claim, the complainant requests that that decision be set aside insofar as it implicitly denies the occupational origin of his invalidity, and that the reason for his entitlement to an invalidity pension be reclassified accordingly. Subsidiarily, he requests that an expert be appointed to give an opinion on whether or not his invalidity is of occupational origin or, alternatively, that the decision of the Medical Committee concerning non-recognition of the occupational origin of his invalidity be quashed and the case referred to a newly appointed Medical Committee.

5. According to Article 107(2) (second sentence) of the Service Regulations, internal means of appeal shall be deemed exhausted for decisions taken after consultation of the Medical Committee. The complaint is therefore

receivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

6. In his decision granting the complainant an invalidity pension, the President of the Office does not expressly state whether the invalidity is of occupational origin or not. In its reply to the complaint and in its surrejoinder, the Organisation leaves no doubt, however, regarding the fact that the occupational origin of the complainant's invalidity has not been recognised for the reason that there is no plausible link between his illness and the performance of his duties in the Office. The complaint is therefore receivable insofar as it raises the question of whether the complainant's invalidity is of occupational origin or not.

7. In dealing with such a matter, the Tribunal may not replace the opinion expressed by a Medical Committee with its own. It is, on the other hand, competent to say whether there was due process and in particular whether the report of a Medical Committee on which an administrative decision is based shows any factual mistake or inconsistency, overlooks essential facts or draws plainly wrong conclusions from the evidence (see Judgments 1284, under 4, 1752, under 9, and 2361, under 9).

In the case in hand, the complaint essentially raises the question of whether the Medical Committee's report on which the impugned decision is based was drawn up in accordance with the proper procedure, whether it is tainted with inconsistency and, in particular, whether the EPO's Administration interfered unlawfully in the drafting of the final report. These are matters which the Tribunal is fully competent to deal with.

8. The Medical Committee's proceedings are governed by Articles 89 to 92 of the Service Regulations. The version that came into effect on 1 January 2004 and is therefore applicable – the request for a Medical Committee having been submitted on 24 May 2004 – was worded as follows:

"TITLE VI

MEDICAL COMMITTEE

Article 89

Composition

(1) The Medical Committee shall consist of two medical practitioners, one appointed by the permanent employee concerned, the other by the President of the Office. A third medical-practitioner member shall be appointed by mutual agreement between the first two if they find that their views differ on the medical question referred to them.

(2) The employee concerned shall appoint a medical practitioner of his choice. This appointment shall be notified to the President of the Office within thirty days of the President of the Office notifying the employee of the appointment of the first medical practitioner. In the event that the employee fails to appoint a medical practitioner who is so able and willing to act, a medical practitioner shall be appointed on his behalf by the President of the Office.

(3) If the medical practitioner appointed by the President of the Office and the medical practitioner appointed by or for the staff member fail to agree on a third medical practitioner within two months as from expiry of the time limit referred to in paragraph 2, the President of the Office shall request the local medical council or comparable organisation to nominate the third practitioner, and shall inform the other two accordingly. Article 92, paragraph 1, shall apply *mutatis mutandis*. The medical practitioner thus nominated shall be appointed by the President of the Office.

(4) A permanent employee of the Office shall act as secretary to the Committee.

Article 90

Duties

(1) The Medical 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, and for determining, for the purposes of these Regulations and of the Pension Scheme Regulations, whether a permanent employee meets the definition of invalidity laid down in Article 13 of the Pension Scheme Regulations.

In its three-member composition, it shall also 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.

(2) Cases shall be submitted to the Medical Committee either on the initiative of the President of the Office or at the request of the permanent employee concerned.

Article 91

Costs

(1) The costs occasioned by the Medical Committee shall be borne by the Organisation.

(2) Where the medical practitioner appointed by the permanent employee is resident elsewhere than at the latter's place of employment, the employee concerned shall bear the cost of additional fees and additional expenses entailed.

Article 92

Proceedings

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

(2) The Medical Committee's opinion shall be given either unanimously or by a majority of the medical practitioners forming the committee; it shall be transmitted in writing to the President of the Office and to the permanent employee, who shall both be regularly informed, in writing, about the status of proceedings and the reasons for any delays.

(3) The Medical Committee's deliberations shall be secret."

The Office has not adopted any implementing rules for the above articles. In this case, the secretariat of the Medical Committee did, however, provide the medical practitioner appointed by the complainant with a document entitled "Conduct of proceedings before the Medical Committee", in order to "inform [him] regarding the conduct of proceedings before the Medical Committee". The relevant part of this document, signed by the medical practitioner on 25 August 2004, reads as follows:

"**1. Membership of the Medical Committee**

The Medical Committee shall consist of two medical practitioners, one appointed by the President of the Office and the other by the permanent employee concerned. A third medical practitioner shall be appointed by mutual agreement between the first two if they find that their views differ on the medical question referred to them.

[...]

2. Proceedings

The medical practitioner appointed by the President of the Office and the medical practitioner appointed by the permanent employee shall each carry out whatever medical examination is necessary to appraise the medical question referred to them. [...]

Within 14 days of the examination, the medical practitioner appointed by the permanent employee shall give his opinion in writing [...].

An opinion should normally be brief and succinct since a detailed medical report is excluded.

The medical practitioner appointed by the President of the Office shall be responsible for assessing the opinions handed in by the other medical practitioner or by the other two medical practitioners and for preparing the vote of the Medical Committee on the appropriate form [...]. The former shall first sign the Committee's vote, after which he shall send the form to the medical practitioner appointed by the permanent employee, who shall confirm by signing it that he has seen the vote and accepted it. This operation shall be repeated in the event that the Medical Committee includes a third medical practitioner [...].

Should any one of the three medical practitioners fail to agree with the Committee's majority vote, he may – without giving medical details – add a comment to the report after signing it in which he shall explain his dissenting opinion.

The form should not be held for more than 14 days by any one of the medical practitioners and should in principle be passed on as rapidly as possible. [...]"

This document is not a statutory text but rather a guideline on the procedure to be followed by the Medical Committee when drawing up its report.

9. The form on which the Medical Committee's report is drawn up is a multiple-choice questionnaire in which the medical experts are asked a number of alternative questions, to which they reply by ticking the appropriate boxes, thus expressing the opinion they have arrived at as a result of their analysis and examinations.

This reporting task was performed not in the course of a consultation between the two members of the Medical Committee, but by the President's appointee alone. This medical practitioner then submitted his views to his colleague appointed by the permanent employee, who signed the form five days later. This fact, like the guideline concerning the conduct of proceedings, shows that the medical practitioner appointed by the President of the Office is in a sense in charge of the proceedings. The second medical expert is left with the choice of either endorsing the conclusions of the first practitioner by signing the form filled in by the latter or disagreeing by refusing to sign the form, in which case a third medical expert must be appointed. Should the first two medical experts continue to disagree, the expert in the minority may issue a dissenting opinion annexed to the report.

10. In the present case, when he signed the form duly filled in by the first medical expert, the practitioner designated by the complainant only apparently endorsed his colleague's conclusions. Indeed, he clearly departed from them in the handwritten note which he attached to the Medical Committee's report. In this note he states that, while from his point of view the invalidity of the complainant is not in doubt, he could not totally exclude the possibility that the invalidity might be of occupational origin. The Tribunal does not need to ascertain the reasons that led him nevertheless to sign the form. However odd his decision might appear, it is crystal clear from a substantive point of view. It signifies that the second expert agreed only partially with the conclusions of the first, that is, only to the extent that they indicated that the complainant suffered invalidity. He did not on the other hand agree with the conclusions insofar as they excluded any plausible causal link between the complainant's duties and the onset of the invalidity.

In the circumstances, the two medical experts should have consulted a third. The inconsistent actions of the second expert should have led the first expert to wonder whether there might have been a misunderstanding regarding the scope of the guideline concerning the prescribed proceedings. Being perhaps more familiar with those proceedings, the first expert should have suggested to her colleague that together they appoint a third expert.

Failing this, it was certainly not appropriate for members of the Office's Administration – faced with a clearly contradictory medical report – to approach the second expert in order to persuade him to withdraw his diverging opinion. This action by the officials concerned is all the more unacceptable for the fact that it was not Dr M. who withdrew his opinion in writing but the officials themselves, who did it in lieu of him on the basis of a mere telephone call. In a note dated 25 May 2005, those who added the handwritten footnote of 26 November 2004 to the Medical Committee's report, giving an account of that phone call, merely state that Dr M., once he was informed of the consequences of his diverging opinion, decided not to have a third expert appointed; they give no objective reasons which might explain his change of heart. The practical effect of the action taken by the Office's officials is that, insofar as the impugned decision does not recognise any occupational illness, it appears to have been taken solely on the basis of the opinion of the medical practitioner appointed by the Office.

11. It must be concluded, therefore, that the procedure followed in this case was flawed. The decision of 3 December 2004 taken by the President of the Office must be set aside for this reason, so that there is no need to consider the other pleas put forward by the complainant.

The case must be referred back to the Organisation, which should convene another Medical Committee to examine the question of whether or not the complainant's invalidity is of occupational origin.

12. The complainant must be compensated for the injury he has suffered as a result of the unlawfulness of the impugned decision.

The Tribunal considers that the injury may be compensated with the payment of 4,000 euros.

13. The complainant is also entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case referred back to the Organisation as said under 11 above.

2. The EPO shall pay the complainant 4,000 euros as compensation for injury.

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

In witness of this judgment, adopted on 17 May 2006, 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 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

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* The German original reads as follows:

"Luxemburg, den 17. Nov. 04

Betr. : Verfahren vor dem Ärzteausschuß im Fall von Herrn N[.] G[.] […]

Die Invalidität von Herrn N[.] steht außer Frage.

Jedoch kann die berufliche Verursachung nicht ganz ausgeschlossen werden.

Ich bitte, diesen Punkt, bevor der definitiven Zuerteilung, mitzubedenken."

Updated by PFR. Approved by CC. Last update: 21 July 2006.