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

111th Session **Judgment No. 3045**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 9 January 2009 and corrected on 15 August, the Organisation's reply of 23 November 2009, the complainant's rejoinder of 5 March 2010 and the EPO's surrejoinder of 17 June 2010;

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 1963, joined the European Patent Office, the EPO's secretariat, in 1997 as an examiner at grade A2 and was promoted to grade A3 in 1999. His health deteriorated in 2003, leading to frequent absences on sick leave from August 2004. On 9 January 2007 the Office's Medical Adviser informed him that he was approaching the end of the maximum period during which sick leave was payable at a rate of 100 per cent under the Service Regulations for Permanent Employees of the European Patent Office and invited him to an interview concerning the

administrative consequences of the situation. The interview took place on 18 January.

On 5 February 2007 the Head of the Personnel Administration Department informed the complainant that a procedure before the Medical Committee was to be initiated. In July the members of the Committee – Dr G., the complainant's regular physician, and Dr K., the Office's Medical Adviser – extended the complainant's sick leave until 31 December 2007. Having failed to reach agreement on the measures to be taken, they decided on 25 January 2008 to appoint a third medical practitioner, Dr V., a specialist in psychiatry and psychotherapy. On 31 January Dr V. was replaced by Dr B., a general practitioner. The complainant's sick leave was extended until further notice. Dr B. examined him on 19 February and 3 March and then asked Dr V. to carry out a supplementary examination, which took place on 7 March. On 20 March the Committee decided by a majority that an expert opinion was necessary. This task was entrusted to a psychiatric institute, which stated in its expert report of 31 August that "[a] triggering and influential factor in the pathological process of somatisation […] is best reflected in the [complainant's] case in the situation and conflicts at his workplace". In its opinion of 1 October 2008 the Committee unanimously concluded that the complainant was suffering from permanent invalidity and that the invalidity had not been caused by an occupational disease. The complainant was informed by a letter dated 8 October 2008 that the President of the Office had decided that he would cease to perform his duties and would receive an invalidity allowance with effect from 1 November 2008. That is the impugned decision.

On 27 October and 24 November 2008 the complainant requested the Office's Medical Adviser to consult "the expert for occupational diseases". On 27 November the Medical Adviser replied that, in view of the Medical Committee's unanimous conclusion that his invalidity had not been caused by an occupational disease, a review of its opinion was possible only if an unforeseeable and decisive event had occurred since then or if new facts or evidence had emerged. However, the complainant did not seem to have invoked any such circumstances in

support of his request. On 12 December the complainant requested that the opinion be reviewed in light of the emergence of new facts and evidence. On 17 December 2008 he was requested to apply directly to the President of the Office for any new procedure.

B. The complainant contends that the procedure before the Medical Committee was tainted with numerous flaws. He states that the EPO prevented him from appointing the medical practitioner of his choice to represent him before the Committee, in violation of the provisions of Article 89(2) of the Service Regulations. Moreover, it did not allow him to change the practitioner representing him despite his repeated requests. He considers that the varying reasons on which the Organisation based its refusals violate Article 89(3) of the Service Regulations.

According to him, the members of the Committee were not properly informed of the rules applicable at the EPO for recognition of an occupational disease, that they therefore implicitly applied German law. He claims that this error adversely affected him because it led to the exclusion from the Committee's proceedings of the question of the possible occupational origin of his illness. He further alleges that the Committee delivered its opinion of 1 October 2008 without having acquainted itself with all the documents relating to his state of health, especially the results of the examination undertaken by Dr V. He emphasises that he was never asked about the problems he encountered at his workplace.

He asserts that some items of medical information were not disclosed to him: for instance, he was unable to consult his medical file and was not given access to the expert's report – which in his view constitutes a vital piece of medical evidence – until after the Committee's meeting of 1 October 2008. According to him, the Organisation concealed this information in order to rule out the possibility of the occupational origin of his illness being recognised.

The complainant maintains that the Committee, by failing to endorse the conclusions of the expert's report, disregarded essential facts in its analysis and that its opinion is furthermore entirely

unsubstantiated. He considers that the conclusions of the above-mentioned report and the new medical evidence provided should have led to a review of the Committee's opinion.

He further asserts that the Committee should have recognised the occupational cause of his illness given that, according to him, the deterioration in his state of health was due to harassment by his supervisor from 2003 onwards. In addition, he considers that the expert's report and a medical certificate by Dr T. dated 2 December 2008 confirm the occupational origin of his illness.

The complainant asks the Tribunal to set aside the decision of 8 October 2008 and to order the defendant to pay him 698,000 euros in material damages, 20,000 euros in compensation for moral injury and 5,000 euros to meet the irrecoverable costs that he had to incur.

C. In its reply the Organisation maintains that the composition of the Medical Committee was in keeping with the rules: the complainant appointed Dr G. on 15 April 2007 in accordance with Article 89(2) of the Service Regulations and confirmed his choice on 6 March 2008. He did not thereafter invoke any circumstance that might have warranted the replacement of that medical practitioner, nor did he take valid steps to withdraw the mandate he had entrusted to him. The defendant submits that the members of the Committee were duly informed of all the differences between the Organisation's internal rules and those applicable under German law. Moreover, it asserts that, contrary to the complainant's allegation, the question of the occupational origin of his invalidity was discussed by the members of the Committee on the basis of the expert's report.

The defendant affirms that Dr V. conveyed the results of the examination he had conducted orally and in detail to Dr B., who then informed the other members of the Committee. It states that the complainant never reported any problem or conflict at his workplace or the harassment that he claims to have suffered. That is why the members of the Committee did not look into the question of the cause of his illness before receiving the expert's report. It further points out that the Medical Adviser informed the complainant, by a letter dated

28 February 2008, of his right to an on-site consultation of his medical file. The Committee delivered a contrary opinion to that expressed in the expert's report because it was not convinced by the report's conclusions that a causal link existed between the complainant's invalidity and the performance of his duties. The EPO maintains that the fact that no reasons were given for the Committee's opinion was lawful since, pursuant to Article 92(3) of the Service Regulations, the Committee's deliberations are secret. Moreover, the complainant had the opportunity to confer with Dr G. to "obtain more information" about the grounds for the refusal to characterise his illness as occupational. The failure to transmit the expert's report to the complainant until 1 October 2008 was due to the fact that expert opinions requested by a committee are not made available to the employee concerned until after the committee's deliberations. Lastly, the Organisation considers that the decision not to review the Committee's opinion is well founded: the conditions laid down in paragraph 8 of the Implementing Rules for Article 90(3) of the Service Regulations were not met.

The EPO submits that the allegations of harassment are not corroborated by any specific fact and it considers them unfounded. It notes that the complainant did not consider it worth his while to approach the Welfare and Counselling Service or the Health Service, which would have been able to offer him appropriate assistance. Furthermore, Communiqué No. 24 of 26 June 2007 stated that formal harassment-related grievances were to be submitted directly to the President of the Office. Contrary to what the complainant claims, the faxes by which he requested support and advice were not addressed to the Head of the Personnel Administration Department but to an official who had no authority in the matter.

D. In his rejoinder the complainant contends that the members of the Committee were informed only at a late stage of the applicable rules, that some rules were not brought to their attention and that others had been repealed. He observes that there is no written evidence to support the statement that the results of Dr V.'s examination were forwarded to Dr B. and the Committee.

E. In its surrejoinder the Organisation maintains that the provisions transmitted to the members of the Committee were those in force when the procedure was initiated.

It produces, on the one hand, Dr B.'s statement according to which Dr V. forwarded to him the results of his examination and, on the other, the statement of the complainant's supervisor concerning the allegations of harassment.

CONSIDERATIONS

1. The complainant joined the European Patent Office in 1997 as an examiner. As he had been absent on sick leave for more than 200 working days over a period of three years, he was invited by a letter of 9 January 2007 to a meeting with the Office's Medical Adviser in order to discuss a number of possible administrative measures. The meeting took place on 18 January. As the complainant's state of health had not improved, he was informed by a letter of 5 February that, since he was reaching the end of the maximum period of paid sick leave at a rate of 100 per cent, i.e. 250 working days, a procedure would be initiated before the Medical Committee and he was requested, to that end, to appoint "[his] medical practitioner" within 30 days, the Organisation having already appointed the Office's Medical Adviser to represent it. By an e-mail of 15 April 2007 the complainant informed the Office that Dr G. was his regular physician.

2. In its first opinion, delivered in July 2007, the Medical Committee considered that the complainant's sick leave should be extended until 31 December 2007. In the second opinion the two members of the Committee disagreed on the measures to be taken. They therefore appointed on 25 January 2008, in accordance with the provisions in force, a third medical practitioner, Dr V., a specialist in psychiatry and psychotherapy. The complainant's sick leave was again extended.

Dr V. was replaced on 31 January 2008 by Dr B., an internist, because, according to the defendant, the complainant did not want the third medical practitioner on the Committee to be a psychiatrist.

After examining the complainant, Dr B. requested a supplementary examination by a specialist in psychiatry and neurology. The examination, which Dr V. was asked to conduct, took place on 7 March 2008. Dr V. communicated his findings orally to Dr B., who reportedly transmitted them to the other members of the Medical Committee.

In a third opinion, dated 20 March 2008, the Committee decided by a majority that an expert opinion on the complainant was required.

On 12 July 2008 the complainant informed the Office's Medical Adviser that he wished to have the medical practitioner representing him before the Medical Committee replaced. The secretariat of the Committee replied, on 15 July, that the replacement of a medical practitioner during the course of a procedure was possible only in the event of *force majeure*, if the illness of the employee concerned had changed or if the medical practitioner he had appointed was no longer able or willing to represent him.

The expert opinion was entrusted to a psychiatric institute. The report that it submitted on 31 August 2008 came to the following conclusion: "In psychiatric terms, [the complainant] presents symptoms of a somatisation disorder and a moderate depressive episode, according to the ICD-10 criteria (International Classification of Diseases 10)." The report, which was submitted to the members of the Medical Committee on 17 September 2008, also found that "[a] triggering and influential factor in the pathological process of somatisation, such as, for example, unpleasant events, difficulties or conflicts in a person's life, is best reflected in the [complainant's] case in the situation and conflicts at his workplace".

On 29 September the complainant reiterated his wish to change the medical practitioner representing him and indicated that he had chosen Dr T., a psychiatrist. In effect he cancelled the appointment of Dr G.

By a letter of 30 September 2008 he was informed, in substance, that since none of the conditions required for the replacement of a member of the Medical Committee was satisfied, the "cancellation of the appointment of Dr. [G. could] not be recognised".

In its fourth opinion delivered on 1 October 2008 the Medical Committee, meeting without the change in membership desired by the complainant, concluded unanimously that the latter was suffering from permanent invalidity which was not due to an occupational disease.

By a letter of 8 October 2008 the complainant was informed that, in accordance with the provisions of Article 62a of the Service Regulations, the President of the Office had decided that he would cease to perform his duties and would receive an invalidity allowance with effect from 1 November 2008. That is the decision impugned before the Tribunal.

3. The complainant principally asks the Tribunal to set aside the decision of 8 October 2008 and to find that his illness should be considered occupational.

4. The defendant considers that the complaint should be dismissed as unfounded.

5. 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, for instance, Judgments 2361, under 9, and 2432, under 3).

6. The Tribunal recalls that the lawfulness of a decision is assessed as at the date on which that decision was taken, and, therefore, it will not, in the present case, rule on the facts occurring subsequently to the decision of 8 October 2008.

7. The complainant contends that the decision of 8 October is manifestly unlawful inasmuch as it was adopted at the close of a flawed procedure, since the composition and functioning of the Medical Committee were defective. As he considers that his invalidity is due to the harassment to which he was allegedly subjected by his supervisor, he deplores the fact that the said decision failed to recognise the occupational origin of his illness.

8. With regard to the composition of the Medical Committee, the complainant takes the defendant to task for compelling him to choose his regular physician, who is a general practitioner. He also criticises it for preventing him from changing his appointed medical practitioner when he so wished, on the legally indefensible ground of failure to respect conditions that supposedly had to be met for such a change to be authorised. He refers, in support of these arguments, to Article 89(2) and (3) of the Service Regulations.

9. The EPO replies that the complainant was requested to appoint "the medical practitioner of his choice", which he had done on 15 April 2007 by appointing his regular physician, a choice that he confirmed in March 2008 when he signed the declaration on the waiver of medical confidentiality. It points out that the appointment of the members of the Medical Committee by the employee and the President of the Office takes place at the beginning of the procedure and that no provision is made for any change. It admits, however, that exceptions such as the impossibility, inability or refusal of the medical practitioner appointed by the employee to fulfil his mandate, or a change in the type of illness affecting the employee, should make it possible to respond to special circumstances in order to pursue a procedure that is under way.

10. Article 89 of the Service Regulations reads as follows:

"(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 […] shall be appointed under the procedure described in paragraph 3 if the first two medical practitioners 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. […]

(3) […] In the case of arbitration under Article 62 […] the time limit for appointment of the third medical practitioner shall be one week. If the first or second medical practitioner withdraws or changes, the appointment of the third shall not be affected.

[…]"

11. The Tribunal considers that in this case Article 89(2) cited above would have been better respected if the Administration, in its letter of 5 February 2007 to the complainant concerning the appointment of the members of the Medical Committee, had taken the care to indicate clearly, reproducing the exact terms of paragraph 2 cited above, that the complainant could appoint the medical practitioner of his choice. Indeed, the terms used in the above-mentioned letter, namely "[w]e request you to appoint your medical practitioner", could have been construed by the complainant to mean that he was to appoint his regular physician.

However, the Tribunal takes the view that by attaching to the said letter a copy of the relevant provisions of the Service Regulations, in particular Article 89, the Administration enabled the complainant to ascertain that he could appoint the medical practitioner of his choice. It follows that he cannot invoke his own negligence in order to challenge the lawfulness of the composition of the Medical Committee in that regard.

12. On the other hand, the Tribunal notes from the wording of the provisions cited above that the employee concerned appoints the medical practitioner of his choice to serve on the Medical Committee and that a change or withdrawal of a member of the Committee is possible, since this eventuality is expressly envisaged in the last sentence of Article 89(3).

Moreover, the defendant itself admits that "it is common sense that exceptions must be possible" in some cases. Yet it subjected the option of changing a member of the Medical Committee to conditions

which, not being based on any written provision or any principle, had no legal basis.

13. The Organisation contends that the complainant's appointment of Dr T., a psychiatrist, was unlawful because he had not validly withdrawn the mandate entrusted to the first medical practitioner he had indicated.

It is clear from the submissions, however, that the Office's Medical Adviser had received on 29 September 2008 a fax from the complainant concerning the withdrawal of the mandate entrusted to Dr G. and that he had discussed the matter during a meeting with the other members of the Committee.

The Tribunal infers from the foregoing that the members of the Committee knew, before delivering their final opinion, that the complainant had decided to change his appointed medical practitioner and failed to take this into account.

14. An analysis of the submissions shows that even if, contrary to the complainant's allegation, the defendant did not compel him to choose his regular physician to represent him on the Medical Committee, the fact remains that the complainant was denied, without any legal basis, the possibility of changing the medical practitioner whom he had initially appointed. By depriving him of the right to make such a change, the defendant breached the applicable provisions and failed in its duty of care vis-à-vis the complainant.

The procedure followed in reaching the opinion that served as the basis for the impugned decision was therefore flawed. That decision is therefore unlawful and must be set aside.

15. As the Tribunal has consistently held, it may not replace qualified medical opinion with its own. Hence, it will not rule on whether the pathology of the complainant is of occupational origin. The case will therefore be sent back to the Organisation so that it may be referred to a properly constituted Medical Committee, and there is no need for the Tribunal to rule on the complainant's other arguments.

16. The complainant requests compensation for the moral injury suffered. The Tribunal agrees that he suffered moral injury as a result of the illegality censured in this judgment, which may be fairly compensated by an award of 5,000 euros.

17. As he succeeds, the complainant is entitled to costs, which are also set at 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back to the EPO for referral to a Medical Committee, as indicated under 15, above.
3. The Organisation shall pay the complainant compensation of 5,000 euros for moral injury.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2011, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet