

**L. (No. 4)**

**v.**

**EPO**

**132nd Session**

**Judgment No. 4424**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr C. L. against the European Patent Organisation (EPO) on 29 July 2013 and corrected on 11 October 2013, the EPO's reply of 28 January 2014, the complainant's rejoinder of 4 March and the EPO's surrejoinder of 4 June 2014;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the outcome of his appeals concerning absences and reduced working hours for medical reasons.

On 20 February 2008 the complainant, a permanent employee of the European Patent Office, the EPO's secretariat, submitted a medical certificate from his doctor dated the same day indicating that his working hours should be modified with effect from 21 February due to health problems. On 25 February the Director of the EPO's Occupational Health Service (OHS) informed him that, as the certificate did not mention the end date for this working time reduction, as required by the rules, the Director would confirm it until 13 March and would seek further advice from the Administration. A few days later, the complainant was informed that the EPO's medical adviser, Dr K., would be consulted. Following a medical examination which took place on 6 March with Dr B., a doctor acting on behalf of the Organisation, it was confirmed

that 13 March was to be the end date of the new working hours. Despite that, the complainant declared that he would go on with reduced working hours as recommended by his doctor. The Administration again sought advice from Dr K. who, on 14 March, confirmed that the partial sick leave was accepted until 13 March and, after that date, the complainant was expected to work normal hours.

By letter of 17 March 2008 the complainant was reminded that he should have resumed his activities on a full-time basis as of 14 March. The following day he was informed that a procedure for unauthorised absence could be initiated against him. An exchange of correspondence ensued between the Administration, the complainant's Director and the complainant. The latter argued that his doctor's certificate prevailed over the OHS's conclusions and he contested the retroactive effect of the 17 March letter.

On 25 March 2008 the complainant was informed that the matter would be referred to a Medical Committee for further examination and that the EPO had appointed Dr K. to this Committee. The complainant was invited to appoint a medical practitioner to represent him – which he did on 2 June by appointing Dr W. – and was instructed to return to full-time work pending the final opinion of the Committee, failing which he would be considered as being on unauthorised absence and a disciplinary measure could be taken against him. On 11 April he was informed that he would be considered being on unauthorised absence for the days he had been absent without prior permission and that those days would be deducted from his annual leave entitlements. The complainant contested this, maintaining that his doctor's certificate should prevail pending the issuance of the Medical Committee's opinion and stated that he would work on a part-time basis. On 29 April he was informed that, in view of the appointment of a Medical Committee, the reference to unauthorised absence and possible disciplinary measures in the letter of 25 March should be considered as void. On 13 June the complainant lodged two appeals against the decisions of 17 March and 11 April and requested, inter alia, an apology from the EPO and compensation for damages. His appeals were referred to the Internal Appeals Committee (IAC).

The Medical Committee, composed of Dr K. and Dr W., met on 4 July 2008 and the complainant received its report on 9 September 2008. The Committee confirmed that he was medically fit to work as of

14 March and recommended that a maximum of four hours per week be granted, if necessary, for medical appointments for on-going treatments. On 11 September 2008 the complainant objected to the retroactive effect of the report, requesting that the date be changed from 14 March to 12 September to enable him to adapt to the Committee's recommendations. On 16 March 2009 Dr W. requested Dr K. that the retroactive date of the medical report be cancelled.

Parallel to these events, on 17 June 2008, the complainant reported himself sick without providing any medical certificate justifying his absence or contacting the OHS. An appointment to conduct a medical examination to assess whether his absence was for *bona fide* reasons was scheduled for 4 August. The complainant, who had asked that the date be postponed, did not attend. He also failed to meet the OHS physician on 19 August. On 25 August he was informed that the matter would be referred to a new medical practitioner, Dr A., and that he was expected to cooperate by attending a new medical examination, otherwise he would be considered as being on unauthorised absence potentially leading to a disciplinary action. On 1 October the complainant was examined by Dr A., who informed the EPO that he could not confirm either a partial or full work incapacity having regard to his field of specialisation.

A further examination was scheduled for 3 November 2008 with another specialist, Dr Z., nominated by Dr K. and Dr W. On 30 October the complainant informed the Secretariat of the Medical Committee that he would not attend the appointment because he should first be examined by Dr K. before his sick leave could be contested. He did not attend the appointment, and thus Dr Z. could not perform his task. On 12 November 2008 the complainant was informed that his attitude and conduct were unacceptable and in breach of his obligations, that unauthorised absence had been established as from 3 November and, consequently, as from that date, each day would be deducted from his annual leave entitlements and, once these were exhausted, from his remuneration. He was also advised that the possibility of establishing unauthorised absence with retroactive effect was being examined, as was the taking of disciplinary actions and/or any other appropriate legal steps. The complainant submitted his comments, apologized for the confusion and informed the Administration that he had in the meantime met with Dr Z. He asked for a reconsideration of the contested decision and proposed a discussion.

The results of Dr Z.'s report – according to which there was no reason to conclude that the complainant was forced to be absent from work on grounds of incapacity – were communicated to the complainant on 14 January 2009 confirming his administrative status of unauthorised absence at the latest as from 3 November 2008 as well as the deduction of his days of absence from his annual leave entitlements until 7 January 2009 and from his remuneration as from 8 January. The complainant was enjoined to resume full-time work with immediate effect and was informed that any reintegration issues following his long absence should be addressed to his line manager and the OHS. Between 10 and 18 February 2009 the complainant lodged several appeals against, inter alia, the decision of 12 November 2008 and the Medical Committee's report of September 2008, requesting essentially damages and apologies. His appeals were referred to the IAC.

On 15 January 2009 the complainant resumed work and requested an appointment to discuss the option of a reintegration program. His Director agreed with the programme and the OHS confirmed a reduced schedule for a limited period. On 19 January the complainant informed the Administration that he considered his doctor's certificate of 20 February 2008 as still valid and stated that he would adhere to it. The following day he wrote to Dr K. contesting the validity of Dr Z.'s report. His allegations were rejected and he was advised that the EPO was further considering the possibility of determining his unauthorised absence as commencing from 17 June 2008. On 17 February he was informed that the Administration intended to impose a reprimand on him and he was invited to comment, which he did.

On 7 April 2009 a reprimand was issued against him for unauthorised absence from service between 17 June and 2 November 2008 and between 3 November 2008 and 14 January 2009, for failing to attend medical examinations and for failing to cooperate, thereby obstructing and delaying the procedure. The complainant lodged two more appeals on 24 April and 2 July against a deduction shown in his January 2009 payslip – which the Administration subsequently reimbursed, explaining that it was an error – and against the reprimand. These appeals were referred to the IAC.

On 27 February 2013 the IAC issued a single opinion on all the complainant's appeals. It unanimously recommended withdrawing the reprimand, correcting the complainant's records in respect of the absences,

and paying him damages in the amount of 1,500 euros. Further moral damages were recommended by its members but there was a disagreement on the amount. By a letter dated 2 May 2013, which constitutes the impugned decision, the complainant was informed that all his appeals were rejected as either unfounded or irreceivable and that, in view of the time passed, the reprimand was removed from his personal file.

The complainant asks the Tribunal to quash the impugned decision and order that the EPO award him moral and punitive damages, costs in the amount of 2,500 euros, and any other relief as appropriate.

The EPO asks the Tribunal to dismiss the complaint in its entirety.

#### CONSIDERATIONS

1. The complainant requests oral proceedings. As the Tribunal is sufficiently informed on all aspects of the case to consider it fully on the written submissions and documents which the parties have provided, the request for oral proceedings is rejected.

2. At relevant times, the complainant was a member of the staff of the EPO. Between February 2008 and mid 2009 he was in dispute with the EPO about his absences from work due to what he claimed was ill health. In the result, the complainant brought four internal appeals during that period against several decisions of the Organisation, three of which related directly or indirectly to his absences while the fourth related to his payslip in January 2009. He was substantially successful before the IAC, which issued its opinion in February 2013. However, by a decision of 2 May 2013, the Vice-President of Directorate-General 4, by delegation of power of the President, rejected all the appeals as either unfounded or irreceivable. This is the decision impugned in these proceedings.

3. The dispute between the complainant and the EPO began when the complainant provided the Organisation on 20 February 2008 with a medical certificate dated the same day from his doctor. In effect, the doctor was saying the complainant should, because of his health condition (in fact, orthopaedic problems, concentration problems and tinnitus), work restricted hours, namely seven hours on Mondays and Fridays, six hours on Tuesdays and Thursdays, and four hours on Wednesdays.

The certificate did not say for what period these arrangements should operate. On 25 February 2008 the Director of the OHS determined an end date of 13 March 2008 which was later confirmed following a medical examination on 6 March 2008 by a doctor acting on behalf of the EPO. Before 13 March 2008, the complainant was working the reduced hours but became aware that, from the EPO's perspective, he was required to return to full-time work on the following day, i.e. on 14 March 2008. On 13 March 2008 the complainant informed the EPO that he would continue working reduced hours as recommended by his doctor. In due course, a Medical Committee comprising two doctors was established to resolve what had been, in effect, a difference of medical opinion between the EPO's medical adviser and the complainant's doctor about whether the complainant should work reduced hours. One of the two doctors was appointed by the complainant. The two doctors constituting the Medical Committee met on 4 July 2008. They both agreed that the complainant was fit to work full-time as of 14 March 2008. This was reflected in a report signed in July 2008 by one, on or about 25 August 2008 by the other.

4. The IAC concluded that, in the face of a difference of medical opinion between the EPO's medical adviser and the complainant's doctor about whether the complainant should work reduced hours, the dispute should have been referred to a third medical practitioner under Article 62(13) of the Service Regulations, adopting the procedure in Article 89(3). Thus, the third medical practitioner would act as arbitrator and her or his opinion would be binding. In the impugned decision, the Vice-President took the view that it was appropriate and lawful to constitute a Medical Committee.

5. The relevant provisions, applicable at the material time, read as follows:

**“Article 62  
Sick leave**

- (1) A permanent employee who provides evidence of incapacity to perform his duties because of sickness or accident shall be entitled to sick leave.
- (2) The employee concerned shall notify the Office of his incapacity as soon as possible and at the same time state his present address. If he is incapacitated for more than three working days, he shall, on the fourth working day, send a medical certificate; however if the doctor whom

he has consulted refuses to issue a medical certificate, the employee shall supply the Office with that doctor's name and address.

[...]

- (13) If the Office contests whether the absence on grounds of incapacity is well founded, or the permanent employee, without legitimate reason, fails to undergo a medical examination ordered for the purpose of deciding whether or not he is incapacitated, the medical question in dispute shall be referred to a medical practitioner appointed under the procedure described in Article 89, paragraph 3. This medical practitioner's opinion, which shall be given after consultation of the permanent employee's medical practitioner and of the Office's medical adviser, shall be binding. This procedure also applies for a permanent employee on extended sick leave, but for whom it has been decided that he must resume his duties pursuant to Article 62, paragraph 9.

#### **Article 63**

##### **Unauthorised absence**

- (1) Except in case of incapacity to work due to sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior. Any unauthorised absence which is duly established shall be deducted from the annual leave of the permanent employee concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period.
- (2) If, following the medical arbitration procedure in Article 62, paragraph 13, unauthorised absence has been established, any further absence for the same reasons shall be deducted from the annual leave of the permanent employee concerned. If he has used up his annual leave, he shall forfeit a part of the basic salary, which shall be no more than half, for an equivalent period.
- (3) Application of paragraphs 1 and 2 shall be without prejudice to any disciplinary measures that may apply.

[...]

#### **Article 89**

##### **Composition [of the Medical Committee]**

- (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. [...]
- (3) If the first two medical practitioners fail to agree, within one month from the appointment of the second, on the measures to be taken after the maximum period of sick leave under Article 62, paragraph 7, or after a period of extended sick leave under Article 62, paragraph 8,

they shall choose a third medical practitioner [...] If the first two medical practitioners fail to agree on the choice of the third within one month, a specialist in general internal medicine on the list shall be appointed.

The same procedure applies for appointment of the third member where the Medical Committee is required to deal with any other dispute relating to medical opinions within the meaning of Article 90, paragraph 1. In the case of arbitration under Article 62, paragraph 13, 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.

[...]

#### **Article 90**

##### **Duties [of the Medical Committee]**

- (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 7, and for determining, for the purposes of these Regulations, whether a permanent employee meets the definition of invalidity laid down in Article 62a, except for questions dealt with under the arbitration procedure provided for in Article 62, paragraph 13.”

6. The IAC’s conclusion, summarized in consideration 4 above, was correct. Article 62(13) of the Service Regulations applicable at relevant times provided a mechanism which was enlivened, relevantly, when the Office contested whether a staff member’s absence on grounds of incapacity was claimed for *bona fide* reasons. Quite obviously, in this context, incapacity is incapacity caused by sickness or accident. This contest by the Office would be in circumstances where the staff member would have provided evidence of incapacity as provided in Article 62(1), ordinarily in the form of a medical certificate from the staff member’s doctor (Article 62(2)). What Article 62(13) addressed was a situation where the Office challenged the evidence provided by the staff member. If this was based on a difference of opinion between the complainant’s doctor and that of the EPO’s medical adviser on a medical question, a medical arbitrator was to be appointed to answer that question. In the present case, the difference of opinion was whether the complainant should work shorter hours indefinitely, as proposed by the complainant’s doctor (with the obvious implied qualification that, if circumstances changed, it may be necessary to identify an end point). This was disputed by the Office, which took the view that the complainant could and should return to full-time work because, by 13 March 2008, he would not be incapacitated. In these circumstances, it was appropriate



to follow the procedure identified in Article 62(13) and not the procedure in Articles 89 and 90, particularly given the exception in the latter article which excludes from its scope questions to which the arbitration procedure in Article 62(13) would apply.

7. It follows from the preceding analysis that there never was a lawful assessment of whether the complainant was entitled to work reduced hours as he appears to have done until he reported sick in June 2008. Having regard to Article 63 of the Service Regulations applicable at relevant times, unless and until the medical arbitration procedure had been followed and had established that there had been unauthorised absence, the absence was not to be treated as unauthorised. As Article 63(2) provided, only further (that is future) absences could be accounted for by deductions from annual leave entitlements or otherwise forfeiture of a part of the basic salary. Moreover, as the IAC pointed out, the arbitration procedure should result in a speedy resolution and not, as occurred here, a drawn out process doubtless causing distress to the complainant.

8. But a relevant consideration in considering what relief the complainant is entitled to by way of moral damages is the uncontested fact that the Medical Committee, though unlawfully constituted but including a doctor appointed by the complainant, had unanimously concluded that the complainant could and should have returned to work full-time on 14 March 2008.

9. The next set of issues concerns the complainant's absence from work from June 2008 until 15 January 2009 and related events concerning his failure to attend medical examinations and a perceived lack of cooperation. The latter date is when he actually returned to work. The complainant's absence was viewed by the EPO as unauthorised absence. It and the related events founded a reprimand, by way of disciplinary measure. The IAC recommended the withdrawal of the reprimand. In the impugned decision, the Vice-President defended the disciplinary measure and dismissed the complainant's claims in their entirety. However, he did decide to remove the reprimand from the complainant's personal file, referring to Article 96(1) of the Service Regulations. That provision enabled a staff member to request the deletion of, relevantly, a reprimand after three years from her or his personal

file. The recommendation of the IAC was based on what it perceived to be flaws in the approach of the EPO when considering whether any disciplinary measure should be imposed at all. The removal of the reprimand was not in accordance with the provisions of Article 96, which begins with a written request to the Administration. No such written request was made by the complainant. Accordingly, in the particular circumstances of the case, the decision to remove the reprimand must be viewed as a withdrawal of the sanction by the Vice-President. Thus, the lawfulness of the sanction is moot.

10. The IAC concluded that the complainant's absence between 3 November 2008 (when he failed to attend a medical examination with Dr Z. scheduled for that day) and 24 November 2008 (when he did attend such an examination) could have been considered as unauthorised leave. In a report dated 15 December 2008, received by the Organisation in January 2009, Dr Z. opined, as it appears from the reasoning of the IAC, the complainant was not forced to be absent from work for any medical reason and should be reintegrated over a two to four week period. The IAC concluded that the complainant's absence from work for the period 24 November 2008 to 14 January 2009 should be "reinstated as authori[s]ed, with the administrative and financial consequences that follow". The Vice-President rejected this conclusion.

The complainant challenges the IAC's conclusion concerning the period between 3 November 2008 and 24 November 2008 referred to at the beginning of this consideration. Even if the complainant is correct that his absence from work for the period 3 November 2008 to 14 January 2009 was not unauthorised leave, he singularly fails to demonstrate in his pleas what the material damage was that he suffered, if that is a correct characterisation of his claim. His focus was on what can only be described as extravagant claims for moral damages for this and other events.

11. One further matter needs to be discussed briefly. The complainant's payslip for 2009 understated the pay he was due. The IAC concluded the EPO had acted wrongly and characterised the event as "tamper[ing] with salary". In the impugned decision, the Vice-President sought to explain the incident as a clerical error during data entry when an appropriate coding had to be chosen. In its reply, the EPO provides a detailed and credible explanation of how the mistake had been made.

In his rejoinder, the complainant does not address that explanation other than to say that he adheres to his pleas in his brief. The EPO rightly points out that the complainant's argument is tantamount to an accusation that it acted in bad faith. That must be proved and not presumed (see Judgment 4345, consideration 6, and the case law cited therein). It has not been proved in this case.

12. Aspects of the treatment of the complainant in the period February 2008 to January 2009 were unlawful and the impugned decision should be set aside. The complainant is entitled to moral damages for the prejudice he suffered, which the Tribunal assesses in the sum of 15,000 euros. He is also entitled to costs in the amount of 1,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall pay the complainant 15,000 euros by way of moral damages.
3. The EPO shall also pay the complainant 1,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ