Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

d. l. F. d. A. (No. 4)

v.

EPO

135th Session **Judgment No. 4635**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr P. d. l. F. d. A. against the European Patent Organisation (EPO) on 6 April 2019 and corrected on 23 April, the EPO's reply of 1 August 2019, the complainant's rejoinder of 28 November 2019 and the EPO's surrejoinder of 5 March 2020;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant impugns the decision to reject his internal appeal in which he requested that an expert in occupational diseases be consulted.

The complainant joined the European Patent Office, the EPO's secretariat, in 1987 and ceased his employment on 1 August 2006 on the grounds of invalidity, following a report delivered by the Medical Committee on 20 July 2006 stating that his invalidity was not caused by an occupational disease.

In a letter of 17 April 2008, the complainant's counsel – who stated he was acting "in the name and on behalf" of the complainant although he did not provide proof of having power of attorney – asked Dr K.,

whom the President of the Office had appointed as a member of the Medical Committee, to find that there was a causal connection between his client's invalidity and the latter's performance of his official duties. He added that he had likewise notified this request in writing to Dr T., the second member of the Medical Committee, who was thereby implicitly appointed to that role on the complainant's behalf. On 5 May the Administration informed the complainant that reconsideration of the reasons for invalidity was governed by Article 90(3) of the Service Regulations for permanent employees of the European Patent Office, under which it was for the Medical Committee to determine whether it was appropriate to consult an expert in occupational diseases, which it would do if it suspected that an occupational disease could have caused the invalidity in question. The complainant was informed that a medical committee composed of Dr K. and Dr T. would therefore meet to decide whether an expert should be consulted. On 4 June 2008 the secretary of the Medical Committee invited the complainant to correct his request based on Article 90(3) by providing written confirmation of his counsel's power of attorney or at least of Dr T.'s appointment, made by that counsel.

On 15 April 2011 the complainant confirmed his counsel's power of attorney and repeated the request made by his counsel on 17 April 2008. He explained that he was requesting more specifically that the Medical Committee consult an expert in occupational diseases pursuant to the provisions of the second sentence of Article 90(3) of the Service Regulations, which allowed permanent employees or former permanent employees to submit such a request if they considered themselves to be aware of a possible connection between the pathology resulting in their invalidity and the conditions in which they performed their duties. The complainant considered that in those circumstances an expert automatically had to be consulted. He stated that if his request was not granted, his letter should be regarded as an internal appeal and in that event he claimed compensation for the moral and material injury he considered he had suffered and costs. On 23 May the secretary of the Medical Committee told him that his request for an expert to be consulted automatically could not be granted since the Committee had to reconsider its report of 20 July 2006 in the light of any new evidence that he could provide and decide whether it was appropriate to consult that expert. On 15 June 2011

the complainant was notified that his appeal had been forwarded to the Appeals Committee for its opinion.

In the meantime the Medical Committee met on 30 May 2011. In a report dated the same day and forwarded to the complainant on 1 June, the Committee stated that the information he had provided did not allow it to ascertain whether it was appropriate to consult an expert in occupational diseases. It invited him to meet with Dr K. and Dr T. so that his state of health could be duly examined before it gave its final opinion. The meetings scheduled were postponed several times owing to the complainant's sporadic absences. On 18 November 2011 the Committee asked a different doctor to carry out a further examination, then on 15 May 2012 the complainant appointed Dr S. as the new doctor to replace Dr T., who had indicated that he wished to end his involvement.

On 28 November 2013 the complainant repeated his request to the Medical Committee's secretariat for an expert to be consulted. The Administration replied on 19 December 2013 by referring him to the communication of 23 May 2011. The complainant requested that this decision be reviewed, but registration of his request was refused as it duplicated the subject-matter of the internal appeal that he had already lodged.

The last meeting with Dr S. took place on 21 May 2014. The next day the Medical Committee delivered its opinion, in which it found it appropriate to consult an expert. By a letter of 9 November 2015 the complainant was officially informed of Dr N.'s appointment and was invited to meet him on 21 January 2016.

The Appeals Committee issued its opinion on the complainant's appeal on 26 October 2016. It recommended that the appeal be rejected as irreceivable because the complainant's main claim had been granted by Dr N.'s appointment. After the public delivery of Judgments 3694 and 3785, which, although they concerned cases that did not involve the complainant, found the membership of the Appeals Committee at the time when it delivered its opinion to be unlawful, the President of the Office referred the complainant's internal appeal to a newly composed Appeals Committee. That committee issued its opinion on 19 November

2018. It recommended that the appeal be rejected on the grounds that it was moot and that the complainant be awarded 350 euros for the length of the appeals procedure. In a letter of 18 January 2019, the complainant was informed of the decision of the Principal Director of Human Resources, taken by delegation of power from the President, to endorse that opinion. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to establish a new medical committee with two different members pursuant to Article 90(3) of the Service Regulations, to arrange for that committee to consult a French-speaking expert as quickly as possible in order that the expert draw up an expert report as provided for in aforementioned Article 90(3), and to ensure that the Committee examine that expert report and other relevant reports and issue an opinion as to whether his invalidity was service incurred. He also seeks compensation in the amount of 80,000 euros for the moral injury he submits he has suffered on account of the undue length of the medical proceedings and the appeal proceedings and the state of anxiety, insecurity and stress in which he and his family have had to live for over 10 years. Lastly, he claims the sum of 15,000 euros in costs.

The EPO submits that the claims requesting that a medical committee deliver an opinion on the cause of the complainant's invalidity after consulting a new expert go beyond the scope of the present case. In any event, it submits that the complaint is now moot since the complainant's main claim has been granted. It asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 18 January 2019 that rejected, in the circumstances set out in the above summary of the facts, the internal appeal he had submitted to the President of the Office seeking the consultation of an expert with a view to obtaining recognition by the Medical Committee that his invalidity was caused by an occupational disease.

2. The present dispute concerns the application of the provisions of Article 90 of the Service Regulations, in the version predating the reform of the invalidity scheme by decision of the Administrative Council CA/D 2/15 of 26 March 2015, and more specifically paragraph 3 thereof, which read as follows:

> "The Medical Committee shall consult an expert if it considers that the invalidity within the meaning of Article 62a could have been caused by an occupational disease as referred to in the Implementing Rules hereto. Within five years from when a permanent employee, a former permanent employee or a rightful claimant on his behalf became aware of a possible connection between the pathology of the permanent employee concerned and the conditions in which he performed his duties, the permanent employee, former permanent employee or rightful claimant on his behalf may request the Medical Committee to consult the expert."

According to the complainant, whose counsel had submitted a request on 17 April 2008 (regularised only on 15 April 2011) seeking recognition that his invalidity, diagnosed in 2006, was caused by an occupational disease, the second sentence of Article 90(3) meant that whenever such a request was submitted an expert automatically had to be consulted by the Medical Committee. He therefore asked that an expert be consulted without any other preliminary formalities. In the letters of 23 May and 15 June 2011 the relevant services of the Office replied, in essence, that this was not what the provisions in question meant and that an expert in occupational diseases would be consulted by the Medical Committee only if, having discussed the matter in light of the medical information in its possession, it considered that the occupational disease referred to might indeed have caused the invalidity. That refusal to grant the complainant's request led him to refer the matter to the Appeals Committee.

3. At the outset, the Tribunal observes that the complainant's contention concerning the interpretation of the applicable provisions, on which the dispute turns, is patently unfounded.

Contrary to what the complainant submits in his complaint, the second sentence of aforementioned Article 90(3) of the Service Regulations, insofar as it provides that a permanent employee, a former permanent employee or a rightful claimant on her or his behalf "may request the Medical Committee to consult the expert" if they consider

that the invalidity of the permanent employee or former permanent employee concerned might be recognised as service incurred, does not mean that the Medical Committee is required to grant such a request if it is made. On the contrary, a reading of Article 90(3) makes plain that the provisions of its second sentence, the sole purpose of which is to determine the conditions in which a permanent employee, a former permanent employee or a rightful claimant on her or his behalf are allowed to make such a request, do not create any exceptions to the provisions of the first sentence, under which the Committee is only required to consult an expert – whether or not it is led to address that issue on its own initiative – "if it considers that the invalidity [...] could have been caused by an occupational disease". That interpretation is further borne out by the provisions of the Implementing Rules for Article 90(3) of the Service Regulations, of which paragraph 1 of part I, entitled "Occupational disease", provides for an expert to be consulted "[i]f the Medical Committee suspects that the invalidity was caused by an occupational disease". Furthermore, it should be pointed out that the complainant's interpretation would render meaningless the Committee's involvement in the procedure where the request is made by the permanent employee concerned, which would make little sense.

Moreover, the complainant is likewise wrong to submit that the Committee was not entitled to ask him to provide information of a medical nature or to undergo further examinations. The Committee cannot determine whether a permanent employee or former permanent employee's invalidity might have been caused by an occupational disease unless it has sufficient information to enable it to take a decision on the matter, which clearly entitles it to make any request it sees fit to that end.

The complainant's challenge was therefore entirely unfounded on the merits.

4. However, the complaint must be dismissed on two further grounds.

5. First, the Tribunal observes that the decision contested by the complainant was not an act adversely affecting him and therefore could not be challenged. Accordingly, the complaint is irreceivable.

As the summary of the essential facts of the case in consideration 2 above makes plain, the refusal to grant the complainant's request for an expert to be consulted had neither the aim nor the effect of ending the procedure he had initiated with a view to obtaining recognition that his invalidity was caused by an occupational disease. The refusal only meant that the request in question would be submitted to the Medical Committee for consideration, instead of being regarded as having to be granted automatically, as the complainant contended. Apart from the fact that it in no way prejudiced the eventual outcome of the request, this decision was merely a step in the process of reaching a final decision on the question of whether the invalidity was to be recognised as service incurred.

However, under the Tribunal's settled case law, when a decision is thus taken in the procedure leading to a final administrative decision, it must be regarded merely as a preparatory step and is not therefore challengeable in itself, although it may be challenged in the context of an appeal directed against that final decision (see, for example, Judgments 3433, consideration 9, and 2366, consideration 16, or, specifically in respect of decisions taken, as in this case, in proceedings of a medical nature, Judgments 3893, consideration 8, or 3712, consideration 3).

Lastly, while it must be noted that from the start of the dispute the EPO has never argued that the complainant's claims are irreceivable, that does not prevent such a finding in the present judgment. It is well-established case law that, because they involve the application of mandatory provisions, issues of receivability can be raised by the Tribunal of its own motion (see, in particular, Judgments 3648, consideration 5, 3139, consideration 3, 2567, consideration 6, or 2097, consideration 24) and, while plainly it will not do so unless the submissions make such irreceivability clear, that is the situation here.

6. Second, it is apparent from the file that, in view of the information that it was able to gather on the complainant's medical situation, the Medical Committee ultimately decided on 22 May 2014 to consult an expert in occupational diseases. The complainant's request for that consultation must therefore be seen as having been granted, albeit not immediately and not in the form that he would have wished, which thus rendered the complainant's claim moot.

It is true that, for reasons attributable to the EPO, there was a lengthy delay in actually appointing an expert, and the complainant was only officially informed of Dr N.'s appointment to that role in a letter dated 9 November 2015. However, the Appeals Committee, in its unanimous opinion delivered on 19 November 2018, and the Principal Director of Human Resources, in the impugned decision of 18 January 2019 entirely endorsing the Appeals Committee's findings, rightly took the view that the complainant's appeal had become moot when he received that letter at the latest.

Contrary to what the complainant argues in his submissions, the fact that, in his view, the expert appointed did not offer the requisite safeguards of independence and ethical integrity, and that he then carried out his task in improper conditions, is not, in any event, capable of supporting a finding that the Medical Committee did not actually consult the expert and that the dispute has consequently not become moot.

Since the sequence of events recalled above shows that the complaint was already moot when it was filed with the Tribunal on 6 April 2019 – and not that it became moot during these proceedings, in which case the Tribunal would have found that there was no longer any need to rule on it – the complaint must simply be dismissed (on the concept of a complaint or claim devoid of purpose, see Judgments 4060, consideration 3, 3583, consideration 2, or 2856, consideration 5).

That reason is thus added to the considerations set out above that lead the Tribunal to dismiss the complainant's claim for the impugned decision to be set aside.

7. The dismissal of the complainant's main claims necessarily entails the dismissal of most of his subsidiary claims.

In respect of the complainant's claims for an order that the Office establish a medical committee with a different membership and consult a new expert in a completely fresh procedure, the Tribunal notes that these claims are, in addition, irreceivable in that they go beyond the scope of the present dispute. Since, as has already been stated, the complainant's internal appeal was solely directed against the refusal to grant his initial request for an expert to be consulted, the complainant cannot make new claims in his complaint that, as such, do not satisfy the requirement set out in Article VII, paragraph 1, of the Statute of the Tribunal for internal remedies to have been exhausted (see, for example, on that point, Judgment 3963, delivered on the complainant's second complaint, considerations 3 to 5).

To support his claim for moral damages, the complainant refers to the anxiety, insecurity and stress that were caused to him by the intention, which he believes he can attribute to the EPO, of "manipulating the proceedings" and deploying "delaying tactics" with the aim of causing detriment to him. However, the Tribunal observes that the complainant's submissions show that the actions giving rise to these accusations are essentially decisions taken by the Organisation's services in the normal course of a procedure for recognising whether invalidity is attributable to an occupational disease, and it is the complainant's misconstruction – identified above – of Article 90(3) of the Service Regulations that is likely to have led him to perceive these actions as manipulative or tactical. Moreover, while the complainant points to various flaws that, according to him, tainted the procedure before the Medical Committee and the length of that procedure, these arguments can only be meaningfully advanced as part of a challenge to the final decision on his request that his invalidity be recognised as service incurred.

8. Lastly, in respect of the claim for compensation owing to the undue length of the internal appeal procedure, which by contrast must be considered in this judgment, the Tribunal recalls that, under its case law, the amount of compensation liable to be granted under this head

ordinarily depends on two essential considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4178, consideration 15, 4100, consideration 7, or 3160, consideration 17).

In this case, the period of around seven years and nine months between the submission of the internal appeal on 15 April 2011 and the decision on it of 18 January 2019 is, in itself, clearly excessive. However, the Tribunal observes that the injury caused to the complainant by that delay was substantially diminished by the circumstance, explained above, that his appeal had become moot by November 2015 at the latest. Moreover, the fact that the appeal was directed, as has been stated, against an act which did not in itself adversely affect the complainant also puts into perspective the injury caused by the delay in considering that appeal (see inter alia on this point Judgment 4493, consideration 9). In the particular circumstances of the case, the Tribunal therefore considers that the compensation in the amount of 350 euros that the complainant has already received pursuant to the impugned decision suffices to redress the injury thus caused.

9. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ