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

G. (No. 12)

v.

EPO

137th Session **Judgment No. 4800**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Ms M.-F. G. against the European Patent Office (EPO) on 4 September 2021, the EPO's reply of 10 January 2022, the complainant's rejoinder of 5 August 2022 and the EPO's surrejoinder of 7 November 2022;

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 challenges the rejection of her requests for special leave for very serious illness of a child.

The complainant joined the European Patent Office, the EPO's secretariat, in 2006. On 30 April 2018 she submitted two requests for special leave for very serious illness of a child, for the periods from 26 to 29 March 2018 and from 24 to 27 April 2018 respectively.

By an email of 2 May 2018, the complainant was informed that her request relating to the period from 26 to 29 March 2018 had been rejected as it was not accompanied by a medical certificate. However, she was invited to submit a new request with a certificate attached. On 28 May 2018 the complainant requested a review of the decision of 2 May 2018. On 8 June 2018 she provided a medical certificate in

support of her special leave request for the period from 26 to 29 March 2018. On 13 June 2018 she received the reply that no decision had been made on the substance of her special leave request, which would be examined by the medical adviser in order to determine the seriousness of her child's illness, in accordance with Article 59(3) of the Service Regulations for permanent employees of the Office. To this end, the complainant was asked to provide the medical adviser with a medical certificate that included the child's diagnosis or, failing this, to describe in her own words the medical reasons for the special leave request. She was informed that a simple medical certificate stating that the child was unwell would not be sufficient.

By an email dated 30 May 2018, the complainant was advised that her special leave request for the period from 24 to 27 April 2018 had been provisionally recorded but would only be confirmed once it had been examined by the Human Resources. The email also stated that further information was needed to enable the medical adviser to assess her request from a medical point of view, such as the child's diagnosis. On 5 June 2018 the Office's medical service contacted the complainant and asked her to provide a medical certificate containing her child's diagnosis or, if that was not possible, to describe the child's medical condition in her own words. The complainant responded by email on 6 June 2018.

On 3 August 2018 the medical adviser sent an email to the complainant, in which she acknowledged receipt of her two special leave requests and asked her to obtain, for each of them, a short letter or prescription from her treating physician which included the child's diagnosis. In her email, the medical adviser explained that a simple medical certificate stating that the child had needed supervision as a result of a medical condition would not enable her to form an opinion on the seriousness of the illness. She also stated that the documents requested were covered by medical secrecy and would not be sent to the Human Resources. On 8 August 2018 the complainant asked the medical adviser whether she was bound by medical secrecy herself. On the same day, the medical adviser replied that, as a doctor registered with the Bavarian Chamber of Physicians, she was indeed bound by

medical secrecy. The complainant then asked the medical adviser whether the immunity that the latter's role within the Office afforded her could lead to a breach of the medical secrecy by which she was bound. The medical adviser responded in the negative and suggested that the complainant send her the necessary documents by post or hand them over in person. On 17 September 2018 the complainant asked the medical adviser to provide her with her physician's registration number.

On 1 February 2019 the Human Resources asked the complainant to provide the medical adviser with the requested documents so that the medical adviser could assess the seriousness of her child's illness within the meaning of Article 59(3)(i) of the Service Regulations, and reiterated that this information would be subject to medical secrecy. On 7 February 2019 the complainant replied that she did not have the requested documents in her possession.

By two emails of 2 April 2019, the Human Resources informed the complainant that her two requests for special leave had been rejected on the grounds that the medical adviser had insufficient information to assess the seriousness of her child's illness and that the complainant's absence during the periods from 26 to 29 March 2018 and from 24 to 27 April 2018 would therefore be counted as annual leave.

On 14 June 2019 the complainant requested a review of the decisions of 2 April 2019. Her requests for review were rejected on 8 August 2019.

On 10 November 2019 the complainant lodged an internal appeal against the decision of 8 August 2019, of which she said she had been notified on 13 August 2019. The Appeals Committee delivered its opinion on 30 March 2021. It recommended that the internal appeal be rejected as unfounded and also found one of the complainant's claims to be irreceivable. By letter of 17 May 2021, the complainant was informed of the decision, taken by delegation of power from the President of the Office, to reject her internal appeal. That is the impugned decision.

The complainant asks the Tribunal to order that she be credited with eight days of special leave for very serious illness of a child or, at least, as it appears from her submissions, with the number of days of

special leave for serious illness of a child to which she was entitled. She seeks damages of 4,000 euros for the "inconvenience" she considers she has suffered and compensation for the injury allegedly caused to the members of her immediate family in the amount of at least 2,000 euros. Lastly, she asks to be reimbursed for the registration fee of her internal appeal.

The EPO asks the Tribunal to dismiss the complaint as unfounded and submits that one of the claims contained therein is irreceivable.

CONSIDERATIONS

1. The complainant impugns the decision of 17 May 2021, taken by delegation of power from the President of the Office, which confirmed the rejection of the two requests for special leave for very serious illness of a child, each being for four days, she had made for the periods from 26 to 29 March 2018 and from 24 to 27 April 2018 respectively, in connection with a health issue from which her daughter was suffering.

The reason given for this rejection, to which the complainant objected in two identically-worded emails of 2 April 2019, was that "the medical information that [she] [had] given the [Office's] medical advis[e]r was insufficient for the doctor to draw the conclusion that the child could be considered as seriously or very seriously ill in line with Article 59(3) of the Service Regulations". The point was thus made that the complainant had not supplied any documentation diagnosing the illness in question and had failed to comply with the request, which had been made several times, to provide information that would enable the medical adviser to assess the seriousness of that illness.

The consequence of the complainant's special leave requests being rejected was that eight days were deducted from her annual leave to cover her absence during the two periods in question.

2. Article 59(3) of the Service Regulations, entitled "Annual and special leave", provides as follows:

"(3) In addition to annual leave, a permanent employee may, on application, be granted special leave. In the following cases special leave in terms of working days shall be granted as shown:

[...]

(h) serious illness of a child: up to two days;

(i) hospitalisation of a child aged 12 or under or very serious illness of a child, as certified by a doctor (if the doctor consulted refuses to issue a medical certificate, the employee shall supply the Office with that doctor's name and address): up to five days;".

The first three paragraphs of Article 89 of the Service Regulations, which is entitled "Medical opinions", provide as follows:

"(1) Unless these Regulations expressly provide otherwise, medical opinions which are to be expressed for the purposes of these Service Regulations shall be provided by a medical practitioner chosen by the President of the Office. [...]

(2) The medical practitioner consulted pursuant to this Title [in other words, generally speaking and in the present case, the Office's medical adviser] shall consider medical questions independently and objectively. In particular he shall neither seek nor accept any instructions [...]

(3) For his assessment and provided the employee agrees, the medical practitioner may consult the employee's doctor and take into account inter alia pre-existing medical reports, or certificates, submitted in due time."

Lastly, Circular No. 22 of 11 May 2015, which laid down the "[g]uidelines for leave" and defined the conditions of application of various articles of the Service Regulations, contains, in particular, a Rule 8 which specifically concerns the special leave for "[h]ospitalisation of a child of twelve years of age or under, or very serious illness of a child" provided for in the aforementioned Article 59. That rule begins by recalling in paragraph (a), that a permanent employee is entitled to up to five working days of such leave "under the conditions laid down in [the said] Article 59" and then goes on to provide, in paragraph (b) relating to the applicable "[p]rocedure", that:

"(i) The permanent employee must provide the Office's medical adviser with a medical certificate containing the permanent employee's name, the full name and date of birth of the ill child and the expected duration

> of the illness. The medical adviser will inform the Personnel Department whether in his opinion the medical conditions of Article 59(3)i) are met."

Rule 8(b)(iii) also specifies that the authority to whom the employee must supply the name and address of the doctor consulted about the child's state of health in the event of that doctor refusing to issue a medical certificate is the Office's medical adviser.

3. It is clear from these various provisions that special leave requested by an employee for "very serious illness of a child" can only be granted following an opinion from the medical adviser, who must determine the seriousness of the illness in question, and that this opinion must be given in the light of a medical certificate provided by the doctor who examined the child – or, if applicable, on the basis of other documents or information provided by that doctor – containing sufficient details of the condition diagnosed to allow the medical adviser to make the necessary assessment.

The objections raised by the complainant as to this interpretation of the regulations at issue must fail.

Firstly, while it is true that the aforementioned Rule 8(b)(i) of Circular No. 22 does not, when listing the matters to be included in the medical certificate, expressly mention a diagnosis of the illness in question, the need for that diagnosis to be mentioned necessarily follows from the wording of that subparagraph where it specifies that the medical adviser is to inform the Office "whether in his opinion the medical conditions of Article 59(3)i) are met", which means that the medical adviser must be in a position to verify the "very serious" nature of the illness in question.

Secondly, although it is true that the reference in Article 89(3) of the Service Regulations to the "employee's doctor" is not appropriate in the particular case of leave requested for the illness of a child, it is clearly to be taken, in the legal context relevant to that situation, as a reference to the doctor consulted to examine the child, as is also clear from the wording used in Article 59 and in Circular No. 22.

4. In the present case, it is apparent from the file that the complainant systematically refused, from the outset, to provide the medical adviser with a medical certificate diagnosing the illness relied on in support of the two disputed requests for leave. The complainant also failed to follow the suggestions made to her by the medical adviser to use other means of evidence such as the production of a short letter from the doctor who had examined her daughter or a prescription that mentioned the condition diagnosed. Furthermore, it is not established from the evidence on file that the complainant accepted the offer made to her, as she claims in her submissions, to describe her child's state of health in her own words, even though, in view of the applicable regulations, that was an extremely versatile way of justifying the seriousness of the illness in question. Lastly, the complainant also failed to agree to the medical adviser making direct contact with the doctor concerned in order to obtain the necessary information, as was proposed to her when her requests for review of the initial decisions were being investigated, bearing in mind that, under the aforementioned Article 89(3), her consent was needed before such a step could be taken.

The Tribunal cannot allow the argument put forward by the complainant in her submissions that "the length of the leave requested is in itself indicative of the seriousness of the situation" as it is clearly untenable in the light of the wording of the relevant provisions and the risk of abuse that would stem from such an approach. It must therefore be concluded that the complainant did not give the medical adviser the opportunity to form a view on her requests for special leave for very serious illness of a child and that, by her attitude, she prevented the requests from being granted. Although the complainant was of course completely at liberty to refuse to provide the medical adviser with the required information, she could not then purport to be entitled to a benefit the grant of which is subject to conditions with which she cannot show she complied.

5. In an attempt to counter the obvious conclusion thus arising from the facts of the dispute, the complainant puts forward various pleas, in somewhat random fashion, essentially disputing the lawfulness of the effects of the aforementioned regulations, seeking to establish

that, for legal or factual reasons, it was not possible for her to provide the documents and information requested by the Office and, lastly, criticising various aspects of the way in which her requests were handled. But none of these pleas – some of which are, moreover, of no avail in view of the preceding considerations – is, in the Tribunal's view, well founded.

6. In the first place, the complainant submits that it was not lawful for the doctor who examined her daughter to issue a medical certificate or similar document that included a diagnosis of the illness in question for the purposes of providing information to an employer because such a step would, she argues, breach the law applicable in Germany (the host State of the Organisation where the material facts took place). However, reliance on national law, which cannot be enforced against the EPO, does not create a legal obstacle to the application of rules and regulations governing permanent employees of the Office (see, in particular, Judgments 4553, consideration 4, and 4401, consideration 6). In addition, although it is true that, in practical terms, the complainant was unable to supply such a document in the event that the doctor consulted refused to provide one under German law, the Tribunal considers it impossible to uphold the complainant's arguments concerning a supposed breach of that law as they are merely allusive, do not refer to any particular provision and appear to confuse the communication of medical information to an employer with the communication of such information to a doctor working for that employer. Moreover, it must be noted that the complainant has not submitted any evidence to show that the doctor who examined her child did refuse to deliver a certificate diagnosing the illness for the medical adviser. In addition, as already stated, the complainant was advised that, if she could not obtain a suitable medical certificate, she had the option to describe the illness herself.

Lastly, although the complainant also submits, in the same vein, that German law forbids an employer from holding medical information about the child of an employee, this plea is in any event of no avail since national law does not apply to the Organisation.

7. In the second place, the complainant submits that she was unable to provide the medical adviser with a document diagnosing the illness because, under German law, that would have required the consent of the child's father, who would have opposed it. However, apart from the fact that German law does not apply to the EPO, as has already been stated, the complainant has not, in any event, established that the provisions of the German Civil Code prohibit this step from being taken at the initiative of one parent alone, as she maintains.

8. In the third place, the complainant submits that the circumstances did not permit her to obtain a medical certificate meeting the EPO's requirements at the time that her daughter was ill, as she was too busy taking care of the child. However, that argument is irrelevant since she had the opportunity to correct her special leave requests at a later date by supplying the required certificate or by using another means of proof and had almost one year to do so before the requests were ultimately rejected.

The complainant also complains that the medical adviser, who – in view of the complainant's concerns about medical secrecy within the Office – had suggested that she hand over the document personally at a meeting, fixed a date for that meeting to take place on a day when the complainant herself was on sick leave. However, apart from the fact that it is quite obvious from the file that the unfortunate choice of date was not the result of any malice on the part of the medical adviser, the alternative method proposed for supplying the necessary information in any event merely added to the options already available to the complainant.

9. In the fourth place, with specific regard to the concerns referred to above, the complainant has no grounds for claiming that the Office does not afford sufficient safeguards to ensure that medical secrecy is protected. The content of the guidelines set out in a document of January 2018 relating to the "[h]andling of medical information at the EPO", which is included in the file and which is worded strictly and precisely, can only lead the Tribunal to reject this plea. A different conclusion could be reached only if the complainant showed that these

guidelines are not, in practice, observed by the Office. However, the only mention made of this matter in her submissions, where she claims that her medical file was, in her view, incomplete, is not in itself sufficient to establish a breach of medical secrecy.

10. In the fifth place, the complainant criticises the EPO for failing to inform her of the criteria used by the medical adviser when deciding on the merits of requests for special leave for very serious illness of a child. However, the Tribunal considers, and the Organisation correctly points out, that the seriousness of a medical condition, which depends not only on the nature of that condition but also on its severity and on the range of effects it can produce on patients, must be assessed by means of a medical examination on a case-by-case basis, with which predetermined criteria do not sit well. Furthermore, it must be noted that this question has no concrete connection with the refusal to grant the leave requested by the complainant, since, in this case, the refusal was not based on an assessment of the seriousness of the illness complained of but on the failure to provide the necessary evidence in order to allow the medical adviser to carry out such an assessment.

11. Lastly, although the complainant suggests that the Human Resources might have put pressure on the medical adviser in order to influence the outcome of her requests, that is a matter of mere speculation, unsubstantiated by any evidence on the file. Similarly, the questions the complainant ventures to raise – in a manner which the Tribunal regards as inappropriate – as to the medical adviser's professional competence and even her qualification as a doctor, which is not in any doubt, are clearly devoid of merit.

12. Those arguments will therefore be rejected in their entirety, without there being any need to order the production of the documents and information requested by the complainant, which would contribute nothing to the outcome of the case.

The Tribunal also notes that this conclusion, which confirms that the refusal to grant the complainant's request for eight days' special leave for very serious illness of a child under Article 59(3)(i) of the

Service Regulations was well founded, accords with the view expressed by the Appeals Committee in its unanimous opinion.

13. However, the Tribunal considers that the complainant has good reason to claim, as she does subsidiarily, that she should nonetheless have been granted two days' leave for each of the periods of absence in question, that is four days in total, by way of special leave for serious illness of a child, as provided for in Article 59(3)(h).

The complainant relies on a practice of the EPO, the non-observance of which in her particular case, she alleges, amounts to a breach of the principle of equal treatment, arguing that she met the conditions normally required in order to be granted leave under Article 59(3)(h). This claim is justified.

14. In its opinion referred to above, the Appeals Committee interpreted the complainant's arguments on this point, which she had already raised in the context of the internal appeal procedure, as an attempt to rely on a purported practice of the Office under which, in the event of serious illness of a child, two days' special leave would be granted without the need to supply a medical certificate. The Appeals Committee, whose conclusions were endorsed in their entirety in the impugned decision, found no evidence of such a practice and proposed that the grievance in question be rejected on that ground.

However, in her submissions before the Tribunal, the complainant emphasizes that her arguments on this point were misunderstood and that the practice to which she was referring was in fact one under which the Office would grant two days' special leave for serious illness of a child on the mere presentation of a medical certificate, without any requirement for the leave request to be submitted to the chief physician for an opinion and, accordingly, without any need for the certificate to include a diagnosis of the illness.

15. Firstly, the complainant has submitted evidence, annexed to her submissions, from which it is clear that, on several occasions, she herself was granted special leave for serious illness of a child simply on

the basis of ordinary medical certificates and that requests from employees for that type of leave are regularly granted without any other formality. The existence of such a practice which, according to the Tribunal's case law, means that the Organisation is bound to comply with it (see, for example, Judgments 3680, consideration 12, and 1125, consideration 8) cannot therefore be seriously disputed.

Furthermore, the Tribunal notes that, to the extent that this special leave for serious illness is, apart from leave for very serious illness, the only type of leave available under the Service Regulations in the event of a child being ill, it is in fact hard to imagine how the approach taken by the Office could be any different, particularly in view of the workload that would fall on the medical adviser if the latter had to examine the seriousness of the illness relied on in relation to each of the numerous requests that must be made by employees in that situation.

16. Secondly, and most fundamentally, the Tribunal considers that, if the Office were to submit requests for special leave for serious illness of a child made under the aforementioned Article 59(3)(h) to the medical adviser for an opinion and, in order that those requests might be investigated, were to require the production of a medical certificate including a diagnosis of the medical condition involved, as in the case of requests for special leave for very serious illness, this would, in fact, breach the applicable provisions of the Service Regulations.

The Tribunal must point out that, in contrast to Article 59(3)(i), which deals with leave for very serious illness of a child, Article 59(3)(h) does not, in this regard, provide that the seriousness of the illness must be attested to by a doctor. The provisions of Article 89 of the Service Regulations are therefore not applicable to requests for leave made under Article 59(3)(h). The same goes for Rule 8 of Circular No. 22, which, as already stated, only governs special leave for very serious illness (or hospitalisation) of a child referred to in Article 59(3)(i), and there is no other rule in that circular, nor – according to the evidence on file – in any other existing set of rules, that contains similar provisions in relation to the leave referred to in Article 59(3)(h).

The Tribunal certainly does not infer that permanent employees of the Office are entitled to leave for serious illness of a child without having to supply any medical certificate, as – even though a literal interpretation of the rules could lead to that conclusion – this would fly in the face of common sense. However, it is clear that there is no requirement, when a request of that type is made, for the seriousness of the illness relied on to be evident from the medical certificate produced or for the grant of that leave to be conditional on the medical adviser's opinion.

In the Tribunal's view, the resulting system – by comparison with the system for leave for very serious illness, and bearing in mind that, as already pointed out, EPO offers no other leave for the illness of a child – is to be regarded as creating in fact a presumption that the illness is serious, within the meaning of Article 59(3)(h), simply because it has necessitated a doctor's appointment and a medical certificate issued by that doctor that can be produced to the employer.

17. In the present case, since it is apparent from the file that the complainant had duly supplied a medical certificate in support of her first special leave request, and since the EPO does not dispute the complainant's assertion that she also supplied a certificate for the second request, the Organisation was wrong not to grant her the two days' leave to which she was entitled pursuant to the aforementioned Article 59(3)(h).

Of course, allowing the complainant to access this benefit would entail the redefinition of her requests, since they referred to special leave for "very serious illness", rather than "serious illness", of a child. However, in this area, the Organisation should not adopt an excessively formalistic approach towards its employees and, in the circumstances of the case, the EPO should have granted the complainant the special leave she had requested up to the maximum number of days to which she was entitled. The Tribunal notes, moreover, that the Organisation was aware that it also needed to examine the merits of the complainant's requests in the light of Article 59(3)(h) since it is clear from the wording of the decisions of 2 April 2019, reproduced in consideration 1 above,

that it had duly expressed its view – albeit a partially incorrectly one – on the twofold question of whether the child could be recognized as "seriously or very seriously ill in line with Article 59(3) of the Service Regulations".

18. As a result of the foregoing, the impugned decision of 17 May 2021, the initial decisions of 2 April 2019 and also the decision of 8 August 2019 rejecting the requests for the latter decisions to be reviewed must all be set aside to the extent that they did not grant the complainant two days' special leave for serious illness of a child under each of the requests she had made for the periods from 26 to 29 March 2018 and from 24 to 27 April 2018.

19. By way of compensation for the leave days that were thus unlawfully denied to the complainant at the material time, the EPO must add four days to the complainant's annual leave entitlement for the calendar year during which this judgment is delivered in public, that is for 2024.

20. The complainant seeks the award of 4,000 euros in damages for the injury allegedly caused to her by the impugned decision. However, the Tribunal considers that, in view of the object of that decision, allocating the complainant four additional days' leave in 2024 will, in itself, be sufficient to remedy the whole of the injury she has suffered. This would only be otherwise if the complainant showed that the inability to use the disputed days of leave during the year when they had been denied to her caused her a particular injury owing to a specific need at the time, which is not so in the present case.

21. Neither has it been established that the impugned decision caused any injury to the members of the complainant's immediate family. The complainant's claim for damages of at least 2,000 euros under this head must, therefore, be dismissed in any event, without there being any need to rule on the EPO's objection to its receivability.

22. Lastly, the complainant seeks reimbursement of the registration fee she had to pay, under Article 5(3) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, when she lodged her internal appeal with the Appeals Committee. But that fee forms part of the costs of the internal appeal procedure. The Tribunal will only award costs for internal appeals in exceptional circumstances (see, for example, Judgments 4644, consideration 3, and 4392, consideration 13), and such circumstances do not exist in the present case. This claim must therefore also be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 17 May 2021 is set aside, as are the decisions of 2 April 2019 and the decision of 8 August 2019, to the extent set out in consideration 18, above.
2. Four days shall be added to the complainant's leave entitlement, as indicated in consideration 19.
3. All other claims are dismissed.

In witness of this judgment, adopted on 16 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER