

SEVENTY-NINTH SESSION

In re CERIBELLA

Judgment 1440

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giulio Ceribella against the European Patent Organisation (EPO) on 16 May 1994, the EPO's reply of 12 August, the complainant's rejoinder of 17 September and the Organisation's surrejoinder of 22 November 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, an Italian citizen who was born in 1945, joined the EPO on 1 September 1986 as an assistant examiner at Directorate-General 1 (DG1) at The Hague. On 1 September 1991 he was transferred to Directorate-General 2 (DG2) at Munich as an examiner.

In the twelve weeks following his arrival in Munich he took thirteen days' unauthorised sick leave and fifteen days' unauthorised annual or special leave. From 6 March 1992, he provided the EPO with medical certificates and was again on sick leave during which, without permission, he was in Italy. Having refused several times to comply with orders from the President of the European Patent Office, the secretariat of the EPO, that he should see the medical officer, he went back to Munich on 6 May for a check-up. The medical officer referred him to a psychiatrist who diagnosed acute depression. He was then granted periods of sick leave as prescribed by several doctors whom he had seen in Munich.

On 19 August 1992 the EPO received from him a medical certificate issued by a doctor in Italy. It sent him a telegram on 21 August asking him to report to Munich for examination by the EPO's medical officer, but he refused. On 3 September he applied for referral of his case to the Invalidity Committee.

By a telegram of 7 September 1992 the EPO informed the complainant that he would in future be considered absent without leave and the time of any such absence would be deducted from his annual leave entitlements in accordance with Article 63 of the Service Regulations. By a letter of 9 October the Director of Personnel told him that he had exhausted his annual leave and that payment of his salary would be stopped at 10 October, again in accordance with Article 63. On 19 October he gave the complainant the name of the doctor designated by the President and told him that the Invalidity Committee would be called to decide under Article 62(7) of the Service Regulations whether to extend his sick leave, which on 23 October had reached the maximum allowed under 62(6). In its report of 12 January 1993, which one of its members did not sign until 3 February, the Invalidity Committee decided to extend the complainant's sick leave from six to eight months. It took the view that he was not suffering from any illness that entitled him under Article 62(7) to payment of full salary after expiry of the maximum duration of sick leave. The report was notified to him on 10 March 1993.

By a letter of 22 January 1993 the President had informed him of the start of disciplinary proceedings under Article 93(2)(f) for dismissal on the grounds - among others - that he had refused several times to see the medical officer. But by a letter of 22 April 1993 the Director of Personnel told the complainant's counsel that the President had decided to suspend the proceedings "on purely legal grounds" and that full salary would be paid for the period from 10 to 23 October 1992 and half of it thereafter. By a letter of 23 April 1993 counsel asked the Director of Personnel to pay the salary in full as from 23 (sic) October 1992; unlike the Invalidity Committee the complainant believed he did have one of the illnesses mentioned in Article 62(7). By a letter of 29 April 1993 the Director refused to comply with the request, and on 10 June the complainant lodged an internal appeal with the Appeals Committee against that decision.

On 20 September 1993 the Invalidity Committee met again and concluded that he was suffering from permanent invalidity within the meaning of Article 90(1) of the Service Regulations and that he was therefore unfit for his

duties. He was separated from service and paid an invalidity pension from 1 October 1993.

In its report of 5 January 1994 the Appeals Committee, though giving no opinion on the nature of his illness, found that the halving of salary had been applied retroactively from 23 October 1992 to 15 March 1993. It held that he was entitled to full salary for that period. It recommended considering payment to him of the costs of travel to attend the hearings and pointed out the delay in convening the Invalidity Committee. By a letter of 21 February 1994 the Director of Staff Policy informed him that the President had rejected his appeal. That is the decision he is challenging.

B. The complainant endorses the arguments and conclusions in the Appeals Committee's report of 5 January 1994. By deciding on 22 April 1993 to halve his salary as from mid-October 1992 and thereby applying the Invalidity Committee's conclusion to a period prior to 10 March 1993, the date when he had had its report, the EPO disregarded the rule against retroactivity.

The EPO was to blame for the delay in producing the Invalidity Committee's report. The decision to convene the Committee was taken only four days before the complainant's entitlement to sick leave expired. Furthermore, the Organisation did not invite him either to appear before the Committee or to consult the medical officer "acting as a member of the Committee".

He seeks payment of his full salary for the period from 23 October 1992 to 15 March 1993, plus interest, and the refund of the expenses he incurred for travel to Munich to attend the Appeals Committee's meeting on 14 December 1993.

C. In its reply the Organisation observes that the complainant is no longer challenging the Invalidity Committee's conclusions in its first report about the nature of his illness. It further submits that the retroactivity of the decision of 22 April 1993 is more apparent than real. Article 62(7) of the Service Regulations lays down the general rule that an employee who has sick leave extended beyond the maximum period is paid half his salary and a special rule that in limited circumstances he may be paid in full. Since the Invalidity Committee made no decision on the nature of the complainant's illness, only the general rule applies. Otherwise, and if the Committee were to consider that the employee was not suffering from one of the illnesses in Article 62(7), the complainant would have to reimburse the overpayment. So his salary was reduced not because of the decision of 22 April 1993 but because the general rule in 62(7) was applied as from 24 October 1992. There was therefore no breach of the rule against retroactivity.

The Organisation points out that the complainant persistently refused to turn up for medical examination at the Office and spent much of the period of sick leave, without prior permission, in Italy. It submits that it cannot be held liable for the delay in the proceedings that culminated in the Invalidity Committee's decision. In answer to the complainant's request for a meeting of the Committee the Director of Personnel sent him a letter on 19 October 1992, i.e. within the deadline in Article 106(2) of the Service Regulations, giving the name of the doctor designated by the President.

The Organisation submits that the complainant's main claim is unfounded and it asks the Tribunal to reject his claim to the costs of travel to Munich to attend the appeal hearings on 14 December 1993.

D. In his rejoinder the complainant maintains that the reduction in pay was due to the decision of 22 April 1993. He asked for a meeting of the Invalidity Committee on 3 September 1992, one month and twenty days before his sick leave entitlements expired. But not until 22 April 1993 did the Director of Personnel take his decision in response to the Committee's first report. He notes that the letter of 10 March 1993 sending him the report makes no mention of Article 62(7). He sees that as evidence of the EPO's intention to dismiss him - a letter of 22 January 1993 from the President having told him that disciplinary proceedings were under way - so that applying 62(7) would be pointless.

E. In its surrejoinder the Organisation repeats that the decision of 22 April 1993 was not retroactive. The President's letter of 22 January 1993 was not notice of dismissal. The complainant's conduct warranted disciplinary proceedings. Not until he had read the Invalidity Committee's first report did the President reconsider the complainant's case and decide to stop those proceedings.

CONSIDERATIONS:

1. The complainant joined the EPO as an assistant examiner at The Hague in 1986 and was transferred to its office

in Munich as an examiner in 1991. He is impugning its decision to pay him only half salary for the period from 24 October 1992 to 15 March 1993 - described below as "the relevant period" - when ill health kept him off work.

2. Paragraphs 6, 7 and 11 of Article 62 of the Service Regulations read:

"(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of his basic salary."

"(11) Where a permanent employee is recognised by the Invalidity Committee to be permanently incapable of performing his duties, his sick leave shall be extended until the first day of the month following the decision of the Invalidity Committee and paragraphs 7 to 10 shall continue to apply until that date. Thereafter, the provisions of the Pension Scheme Regulations regarding invalidity pension shall apply to him."

3. By 23 October 1992 the complainant had taken the maximum of twelve months' paid sick leave to which he was entitled under Article 62(6). He continued to be absent from work thereafter but the Organisation made him no payment, pending the report of the Invalidity Committee.

4. It was only on 15 March 1993 that he was given a copy of the Committee's report, dated 12 January 1993. It found him to be suffering from "serious neurotic depression" which had not responded to treatment and to be unfit for work because of "depressive psychic illness". The Committee recommended sick leave for six to eight months and a further medical examination if he did not resume work by 15 August 1993. It concluded by a majority that his was not a "serious illness in the meaning of a schizophrenic psychosis, a cancer or similar health damages, that demand attacking treatment methods and [cause] loss in quality of life". (The translation from the German is the complainant's.)

5. On 22 April 1993 the Organisation decided to put the complainant on half salary under Article 62(7) with effect from 24 October 1992. He continued on half salary until 30 September 1993. In a second report dated 30 September the Invalidity Committee declared him to be permanently incapable of performing his duties. He was accordingly relieved of duty and paid an invalidity pension from 1 October 1993. On that score there is no dispute.

6. By a letter dated 10 June 1993 the complainant appealed to the Appeals Committee claiming payment of full salary from 24 October 1992 on the grounds that his incapacity was due to a serious mental illness within the meaning of Article 62(7).

7. In its report of 5 January 1994 the Appeals Committee held:

(a) It was not competent to decide whether the complainant had been suffering from a serious mental illness, that being a medical question to be decided by doctors.

(b) The date at which the first decision of the Invalidity Committee took effect was 15 March 1993, the date at which he had received it, and the Organisation had wrongly made that decision retroactive by reducing his salary as from an earlier date.

(c) That decision was correctly applicable to the period from 16 March 1993, for which he was entitled only to half salary.

The Committee recommended that he be paid full salary for the relevant period and should be granted the costs of travel to attend the hearing of his appeal.

8. By a letter of 21 February 1994 the Director of Staff Policy informed him that in the President's view the first decision of the Invalidity Committee had no retroactive effect and the appeal therefore failed. That is the impugned decision.

9. The complainant adopts the Appeals Committee's reasoning and conclusions and claims payment of full salary for the relevant period on the sole grounds that the Invalidity Committee's first decision was wrongly made retroactive. Since he does not found the claim on "serious illness", nor allege any flaw in the finding that his was not a serious illness, the Tribunal will not consider those matters.

10. The complainant had exhausted his entitlement to paid sick leave by 23 October 1992. He would become entitled under Article 62(7) to further sick leave either (a) on full salary, if the Invalidity Committee determined that his incapacity for work was due to a serious illness; or else (b) on half salary, but only for any period by which the Invalidity Committee extended his sick leave. Thus at 24 October 1992 he had no immediate entitlement to further sick leave, on full or half salary: any such entitlement arose only if and when the Invalidity Committee decided in his favour. That decision did not take away a pre-existing entitlement, but on the contrary created the entitlement with effect from 24 October 1992. Thus the rule against retroactivity has no application in this case, and the claim fails.

11. Since the complaint does not succeed on the merits, the claim to payment of travel expenses is disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner