NINETY-THIRD SESSION

Judgment No. 2159

The Administrative Tribunal,

Considering the complaint filed by Mrs C. K. against the European Patent Organisation (EPO) on 15 May 2001 and corrected on 26 June, the EPO's reply of 19 September, the complainant's rejoinder of 11 December 2001, and the Organisation's surrejoinder of 4 March 2002;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a Greek national born in 1959, joined the staff of the European Patent Office, the EPO's secretariat, in 1987 as an examiner. At the material time she was stationed in Munich. In November 1998 she underwent inpatient treatment in a Munich hospital and in March 1999 she underwent an operation in Greece.

In a letter of 14 May 1999 the Director of Personnel Management informed the complainant that she was approaching the maximum paid sick leave to which she was entitled under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office and that, in order to ensure the continuation of her salary payment, the Invalidity Committee should be convened for a decision. He gave her the name of the medical practitioner appointed by the President of the Office to the Committee pursuant to Article 89 of the Service Regulations and asked her, within thirty days, to give the name of a physician of her choice. On 8 June the complainant appointed her internist. The complainant's appointee agreed to the nomination of the third Committee member, another internist, on 16 September 1999. On 15 March 2000 the complainant appealed against the composition of the Invalidity Committee.

In August 1999 the complainant resumed work on a half-time basis; she was expected to work full-time as of September. By a letter of 6 September the Director of Personnel Management informed her that the decision of the Invalidity Committee would not be taken in time and that, consequently, as of 4 September her salary would be paid in the form of an advance pursuant to Article 87 of the Service Regulations. On 4 October the complainant protested against this decision, stating that she should not be blamed for any delay in the invalidity procedure and requested that she be paid a "normal" salary until a decision was taken by the Committee. On 11 October the Director of Personnel Management agreed that the delay was not the complainant's fault and therefore informed her that Article 87 would not be applied at that time. It would apply as from 22 November if the Committee had not taken its decision by that date. The Committee issued its first opinion in December 1999, finding that the complainant suffered from a serious illness and extending her sick leave until 30 November 2000.

In a letter of 30 December 1999 the complainant requested copies of the medical reports drawn up by the Committee members. On 12 January 2000 the Director of Personnel Management informed her that he could not grant her request; because of the confidential nature of the Invalidity Committee's proceedings, the Office did not have possession of the reports requested. On 13 January the complainant requested permission to spend her sick leave in Greece, but in a letter of 11 April the Principal Director of Personnel informed her that the President had rejected her request. She was, however, granted permission to return to Greece for certain medical appointments during her sick leave. On 25 April 2000 she filed an appeal against the decision that she could not spend her sick leave in Greece.

In February 2001, in its second opinion, the Invalidity Committee found by a majority that the complainant's extended sick leave should end on 18 February 2001 and that she could resume work part-time as of 21 February;

her appointee dissented. The opinion was sent as a decision to the complainant with a cover letter from the Secretary of the Invalidity Committee dated 22 February, in which the complainant was informed that her sick leave had been extended to 1 March 2001 by a certificate from her doctor. She impugns the content and validity of the Committee's decision.

As the complainant had not come back to work after receiving the Invalidity Committee's opinion, on 8 March and 6 April 2001 the Director of Personnel Management informed her that her absence was considered unauthorised and that she would be subjected to disciplinary proceedings if she did not return to work. She appealed against these decisions on 16 March and 20 April, respectively. On 22 May the Director of Personnel Management informed the complainant that, having satisfied certain conditions that had been set out by the Office, only some of the time she was absent from work was considered unauthorised; consequently, a deduction was made from her annual leave to cover those days. She appealed against this decision on 12 June 2001.

In July the complainant appointed a specialist to represent her on the Invalidity Committee. In its third opinion, dated 21 August 2001, the Committee unanimously found that the complainant was permanently incapable of performing her duties due to illness; she has benefited from an invalidity pension as of 1 October 2001.

B. The complainant submits that the Invalidity Committee's second opinion was flawed. The Committee indicated that her sick leave ended on 18 February 2001 and that she could resume work part-time as of 21 February. But, the complainant says, she did not receive the decision until 26 February.

Furthermore, the Committee committed serious breaches of the rules of procedure. First, its opinion was not signed by her appointee to the Committee: her appointee disagreed with the recommendation that the complainant return to work part-time. Secondly, a medical report submitted by the third Committee member contained contradictory conclusions: on one page he stated that the complainant's health would benefit from her returning to Greece, but on another he stated that she could return to work part-time in Munich. Thirdly, the EPO's appointee to the Committee has refused to hand over to the complainant copies of her medical reports. Therefore, the complainant assumes that this Committee member did not produce a medical report of her own but merely selected one of the two conclusions submitted by the third Committee member. She submits that the Committee's decision is not substantiated by medical information.

Lastly, she objects to the composition of the Invalidity Committee because it did not include a specialist. She alleges that the proper procedure for choosing the third member, "by mutual agreement" of the first two members, was not followed; her appointee was not given a real choice in the nomination procedure.

She requests that the Invalidity Committee's decision delivered to her on 26 February be set aside and the EPO ordered to appoint a new Invalidity Committee. She asks that the EPO be ordered to instruct its appointee to the Committee to release the medical reports concerning her. She also claims an "appropriate sum" in damages as well as costs.

C. The Organisation replies that in the light of the Tribunal's recent judgments on the subject matter, it already requested that the medical reports in question be sent to the complainant. Having satisfied this claim, it is no longer receivable. Her claim for a new Invalidity Committee is also not receivable: it is the subject matter of a pending internal appeal and she has not, therefore, exhausted the internal means of redress.

On the merits, the EPO submits that the Invalidity Committee was validly constituted. It points out that the complainant's appointee was informed of the procedure for choosing the third member and that she did not object to the appointment. The complainant's appointee was also informed that she could contact the Committee's secretariat if she needed clarification on how the Committee worked. As for the complainant's argument that the third member was not a specialist, the EPO notes that the complainant herself chose to appoint an internist and not a specialist. Furthermore, she did not challenge the nomination of the third member until after the results of the Committee's second opinion were known.

It rejects her argument that the Committee's opinion was flawed because it was not signed by her appointee; the latter's dissenting remarks are evidence that she was aware of its contents. Furthermore, if Committee decisions were meant to be taken unanimously, then this would have been specified in the Service Regulations, as it is a fundamental principle of democracy that unless otherwise provided, decisions are taken by a majority. It cannot be criticized that Invalidity Committee opinions do not contain medical or diagnosis information; the purpose of these

opinions is to inform the Office about a staff member's fitness or unfitness for work. They are not supposed to communicate details of a staff member's illness, as the Office is not entitled to such information.

The EPO takes the view that the two conclusions of the third Committee member are consistent, "despite a *prima facie* impression of contradiction". Even though that member believed that the complainant's health would probably benefit from returning to Greece, the fact that he signed the opinion which recommended that the complainant return to work part-time "is evidence that he considered this recommendation as consistent with [his] two ... conclusions".

D. In her rejoinder the complainant submits that the EPO has not satisfied her claim to receive copies of the medical reports requested. Initially, it denied that she had the right to these reports, even though she had cited the Tribunal's case law from 1998 in support of her request. It was not until the Tribunal reaffirmed its precedents in 2001 that the Office ordered copies of the medical reports be sent to her. Nevertheless, she still has not received copies of any of the reports by the Office's appointee so her claim has only been satisfied in part. She now claims it was unlawful for the Office to wait so long before it ordered that she be sent the reports.

The complainant amends her claims to take into account events that have arisen since she filed her complaint. In particular, since a new decision has been taken by the Invalidity Committee and she now benefits from an invalidity pension, she drops her claim to the convening of a new Committee and asks the Tribunal instead to find that the first one was unlawfully established. She alleges that there was undue pressure on her appointee to accept the suggestion put forth by the Office's appointee for the third member and that the physician's name was already on the form provided to her appointee; the latter had no real option other than to agree to the choice. She explains that she did not appoint a specialist because she believed that her own appointee and the Office's appointee would choose one as the third member. Her appointee's opinion in this regard was ignored by the Office's appointee.

She contests the interpretation made by the EPO of the reason her appointee refused to sign the Committee's decision; she explains that, in the light of the conflicting conclusions of the third member, her appointee felt that further examinations were warranted. The complainant adds that the impugned decision did not reflect a majority opinion at all, as each physician provided a different recommendation, and it should thus be considered "null and void".

As for her claim for costs, she expands it to include the costs of her internal appeals.

E. In its surrejoinder the EPO objects to the claim aimed at having an act by the Organisation declared unlawful, as such a claim is not receivable under Article II of the Tribunal's Statute. As for the claim for the medical report of the Office's appointee, it asserts that no such report exists; that Committee member's medical opinion on the complainant's fitness for work was set down directly in the opinion drawn up by the Invalidity Committee. The claim for costs is irreceivable insofar as it concerns her internal appeals, as these are currently not before the Tribunal.

On the merits, it contends that the complainant has provided no evidence to support her allegations that the third Committee member was not chosen by mutual agreement. The EPO reiterates that the complainant had chosen an internist to represent her. If her appointee had expected the third member to be a specialist, then she should have pressed for the appointment of one; instead, she agreed to the appointment of another internist.

It points out that the Office did not have access to the third Committee member's medical report when it took the decision dated 22 February 2001. Thus, the Office's decision "was based on the properly reached opinion of a properly constituted Invalidity Committee"; the Committee's opinion was not flawed by any procedural error.

CONSIDERATIONS

1. The complainant, who at the material time was a permanent employee of the Office, impugns a decision of the Invalidity Committee. That decision, taken while she was on extended sick leave, was sent to her by cover letter dated 22 February 2001. The letter, which was not received by the complainant until 26 February 2001, stated, in part:

"According to this report, your sick leave ended on Friday, 18 February 2001. However, it has been extended to 1 March 2001 by a certificate from your doctor. If you are able to return to your duties then, the Committee proposes that your working hours be reduced by 50% for the first three months, ie until the end of May, and that you continue to receive medical care and medicinal treatment."

2. The Invalidity Committee's opinion was signed only by the Office's appointee and the third member appointed by the first two members. However, a handwritten note dated 7 February 2001 from the complainant's appointee was attached. It read:

"I do not agree with the decision taken in the invalidity proceedings relating to [the complainant].

On one hand a change of location and climate is necessary for the sake of the patient's health, and on the other hand [she] is asked to resume her regular employment duties at a reduced number of hours (Note: which is at the same location as before).

Therefore, I would like to request that the patient undergoes a new physical examination."

3. The reason for this note did not become clear until later. The aforementioned doctor's concern arose from two apparently contradictory conclusions made by the third member at the end of his own relatively detailed medical opinion, but that were not indicated in the body of the Invalidity Committee's report, which was the only document sent to the Office. In fact, each conclusion is contained on its own page, both bear the same date, and are signed by the author.

4. The first conclusion stated that:

"In view of the above conditions, a change of location from Munich to Greece is necessary for the sake of the patient's health."

And the second one stated that:

"As the patient reports - and as has also been confirmed by Professor [G.] - her state of health is now much improved, so that we can expect her to be able to resume work as from January 2001. A 50% reduction in working hours for a period of 3 months is proposed to allow her to get back into her work routine."

5. This second conclusion formed the basis of the Committee's opinion and contains the inconsistency - which may be more apparent than real - that the complainant's appointee noted: how could the complainant return to work and relocate to Greece at the same time? She dissented from the opinion accordingly and recommended further examinations, presumably to clarify the issues. The EPO observes that since the individual medical opinions of the different committee members are kept confidential, the Office acted solely upon the majority view that it had received, as reflected in the opinion.

6. The complainant alleges that the two conclusions were sent by the third member to the EPO's appointee so that the latter could choose the one that she preferred. There is no evidence of any kind to support this speculation. However, in its surrejoinder, the Organisation gives the following explanation. The third member passed his medical opinion along to the Office's appointee with only the first conclusion. Noting that the third member had omitted to assess the complainant's fitness for work (probably due to inexperience as an Invalidity Committee member), the Office's appointee sent a request for such an assessment. In response the third member submitted his second conclusion.

7. The complainant also argues that the opinion of the Committee was flawed because it was signed by only two members. However, the note from the complainant's appointee shows beyond doubt that the latter had seen the majority opinion and was dissenting from it.

8. In the meantime, the complainant had still not returned to work and on 6 March 2001, her counsel requested further instructions with respect to her service. In particular, an upcoming medical examination in Greece set for the end of March was mentioned. The Office responded on 8 March 2001 by way of a letter from the Director of Personnel Management saying that the Invalidity Committee's decision was final and that it could not be overturned by further medical certificates. However, the Director acknowledged that the Office's earlier letter did not make it clear to the complainant that she had to comply with the Invalidity Committee's decision and therefore

excused any additional absences, but requested that the complainant return to work part-time within two days of receiving the current letter. Furthermore, he warned her that any additional absences would be characterised as unauthorised within the meaning of Article 63 of the Service Regulations and could lead to disciplinary action, including dismissal.

9. The complainant also requested on 18 April a copy of any medical opinion that the Office's appointee may have prepared in advance of the Invalidity Committee's second opinion. While this request was originally refused on the alleged ground of confidentiality, on 27 August 2001, citing recent Judgments 2045 and 2047, the Office instructed its appointee to release any medical reports concerning the complainant and the noted documents were given to her. Nevertheless, the complainant remains unsatisfied due to the delay and the fact that there is no formal medical opinion from the Office's appointee to the Committee.

10. Subsequent to the exchange of correspondence in March 2001, the Organisation allowed the complainant to substitute her doctor on the Invalidity Committee for another, and the newly constituted Committee has unanimously concluded that the complainant is suffering from a total and permanent incapacity to perform her duties. Accordingly, she has now been admitted to permanent disability benefit.

11. The complainant has also lodged several appeals against decisions taken by the Office; however, none of the appeals are properly before the Tribunal since, at the time of filing this complaint, the Appeals Committee had not yet made its recommendations. Although the Organisation has now taken a position with respect to three of the appeals, having been raised only in the surrejoinder that position has not been properly argued in the complaint. The Tribunal will not deal with any of them.

12. The only issues the Tribunal must settle are those arising from the correctness or otherwise of the Invalidity Committee's second opinion. No internal appeal procedure was available in respect of the decision contained in that opinion so there is no question of the complaint not being receivable. Nevertheless, the Tribunal is not able to deal with questions which depend upon medical skill and knowledge and will not normally second-guess the findings of medical experts; its role is limited to ensuring that the procedure was fair. In Judgment 620, under 4, the Tribunal stated as follows:

"The Tribunal may not substitute its own views for those of the experts. It will not entertain the complainant's plea that their findings were superficial, illogical or at variance with up-to-date medical opinion. The material issue is whether correct procedure was observed in consulting them."

13. It is clear that in view of the Tribunal's case law, none of the complainant's claims can be granted.

14. No grounds have been established to justify setting aside the Invalidity Committee's second opinion: there is no evidence of any irregularity in the proceedings of the Invalidity Committee. Whether or not one accepts the EPO's explanation for the somewhat ambiguous medical opinions issued by the third member, and it is at least plausible, such contradictions cannot be a cause of nullity. At worst, it could be said that the Committee failed to reach a conclusion and had to study the question further. In the event, that is exactly what has happened, and the complainant has now been found to be permanently disabled. The issue is therefore moot, and the alleged absence of reasons for the decision cannot affect that conclusion.

15. By the same token, there is no evidence to support the complainant's allegation that the Committee itself was irregularly constituted. In fact, it seems quite clear that the relevant rules were followed to the letter and that the third member was regularly nominated by the appointees of the two parties. There is no evidence of improper influence by the Office's appointee. If the complainant had been of the view that some particular medical qualifications were desirable, she had only to appoint a person having the appropriate qualifications as her own appointee; she cannot insist that the other members be similarly qualified. Again, however, the Committee having now been reconstituted to the apparent satisfaction of all and a new conclusion reached, the question is moot.

16. While there is no doubt that the complainant was entitled to the medical reports of the members of the Committee relating to her case, those reports have now been given to her and there is no evidence that any relevant materials have been withheld. One is hard put to see what damage the complainant might have suffered as a result of any delay in the process.

17. Lastly, the complainant's claim for costs relating to her appeals is irreceivable and could be dealt with by the

Tribunal only when the decisions resulting from those appeals come before it. There can be no costs to the complainant on the present complaint since she is unsuccessful.

DECISION

For the above reasons, The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.