NINETY-FIFTH SESSION

Judgment No. 2233

The Administrative Tribunal,

Considering the complaint filed by Mrs S. H. against the European Patent Organisation (EPO) on 30 September 2002 and corrected on 17 October 2002, the EPO's reply of 22 January 2003, the complainant's rejoinder of 27 February and the Organisation's surrejoinder of 11 April 2003;

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

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

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

A. The complainant, who has German nationality and was born in March 1963, joined the staff of the European Patent Office, the EPO's secretariat, in 1989 as an administrative employee at grade B2. From the end of 1993 she was absent from work on the grounds of poor health. On 3 July 1994 she reached the maximum amount of sick leave on full pay provided for in the Service Regulations for Permanent Employees of the European Patent Office. As a result of two successive reports drawn up by the Invalidity Committee in 1994 and 1995 her sick leave was extended. In both those reports the Committee concluded that she was unfit for work but was not considered to be permanently disabled as a result of a serious illness within the meaning of Article 62(7) of the Service Regulations. Consequently, during her extended sick leave she received a reduced salary as provided for in that article. If she had been found to have a serious illness by the terms of Article 62(7) she would have been entitled to the whole of her basic salary.

The Committee issued a further report in July 2002. It found that the complainant was suffering from total invalidity, commenting that: "Given the nature of her complaints and the severe and chronic nature of her illness [the complainant] is absolutely unfit for work now and for the foreseeable future."

She is challenging the decision subsequently taken by the President of the Office which was communicated to her by Personnel Management on 22 July 2002, along with a copy of the Committee's report. By the terms of that decision the complainant was to cease to perform her duties and from 1 August 2002 was to receive an invalidity pension pursuant to Article 54(2); she was reminded that the Committee had found in 1994 and 1995 that her incapacity for work was not the result of a serious illness within the meaning of Article 62(7).

By a letter of 14 August 2002 the Secretariat of the Invalidity Committee returned the July 2002 report form to the three members of the Committee asking them to consider point 1.8 which they had not filled in. Point 1.8 relates to sick leave and reflects the wording of Article 62(7). It asks whether or not the employee concerned is suffering from a "severe" illness, "comparable in severity to cancer, tuberculosis, heart disease, poliomyelitis, or neurological or mental illness". The Committee members expressed an opinion on that one point and in December 2002 the Head of Personnel Administration sent the complainant the completed copy of the report. In his covering letter he informed the complainant that, by a majority opinion, the Committee had found that her ailment was not serious within the meaning of Article 62(7) or comparable to the above illnesses.

B. The complainant contends that her unfitness for work does result from a "serious illness" as defined by that article. She sets out several reasons in support of her view.

First, when it reported in July 2002 the Invalidity Committee stated that her incapacity had resulted from the severe and chronic nature of her illness, and it did not express a different opinion about the nature of her illness, not even under point 1.8 - which had been left blank. Secondly, based on the degree of severity, her illness is comparable to those listed in Article 62(7) and repeated in point 1.8 of the Invalidity Committee's report; she notes that the

illnesses cited therein are given only as examples, and the list is not exhaustive. Lastly, if in the Committee's opinion her condition has resulted in permanent invalidity, it must follow that her illness is "serious" in terms of Article 62(7).

The complainant seeks (1) the quashing of the impugned decision; (2) a finding that in the opinion of the Invalidity Committee she is indeed suffering from a serious illness within the meaning of Article 62(7) and that she is, therefore, entitled to the payment of her full salary for the "entire period" regulated by that article; (3) interest on the amount due; (4) moral damages; and (5) costs.

C. In its reply the Organisation avers that the complaint is irreceivable in part because the complainant's second claim is inadmissible. By that claim she is in effect asking the Tribunal to review a medical report, which the case law allows only on very limited grounds.

Citing the case law and particularly Judgment 2145, the Organisation holds that in the light of the Invalidity Committee's reports of 1994 and 1995 it was legitimate for it to draw the conclusion that the complainant was not suffering from a serious illness within the meaning of Article 62(7). Moreover, the fact that the Committee did not initially fill out point 1.8 of the July 2002 report was not an oversight. The whole of point 1 applied only to the extension of sick leave, but in July 2002 that was not at issue - the Committee had instead to pronounce on the complainant's invalidity. Point 2 related to invalidity, and that part had been filled in. Nonetheless, as this matter had been raised by the complainant, the Organisation subsequently asked the Committee members to fill out point 1.8. Two of the three members opined that the complainant was not suffering from a serious illness in terms of Article 62(7), and the third found that the complainant was. The majority opinion therefore confirmed the conclusion of the reports issued in 1994 and 1995.

On the merits, the EPO submits that the President's final decision was legally well founded. Its main argument is that however severe and chronic the complainant's condition may be, from a medical point of view it did not constitute a serious illness comparable to those listed in Article 62(7), even taking into account that the list of illnesses given is not exhaustive. But it also points out that the seriousness of a disease is a determining factor only for the period during which sick leave is extended.

The EPO notes that the complainant wants the severity of her illness redefined so that she can claim retroactive payment of her full salary for the period when she was on extended sick leave, or at least for part of it. It maintains that her claim is unfounded. More specifically, she cannot claim her full salary for the period up to the end of 1996 when she was receiving reduced pay on extended sick leave as a result of the reports of the Invalidity Committee drawn up successively in 1994 and 1995, because in both those reports the Committee found that she was not suffering from a serious illness; she therefore had no entitlement to full pay.

D. In her rejoinder the complainant states that the "alteration" made to the Committee's report in late 2002 should not be taken into account, and alleges that the Organisation must have influenced the two doctors forming the majority opinion in an attempt to obtain an outcome on her case that would financially favour the EPO.

E. In its surrejoinder the Organisation states that the Committee's indication under point 1.8 constituted a clarification not an alteration. It rebuts the complainant's view that it exerted pressure on any members of the Invalidity Committee.

With regard to the complainant's argument that an illness leading to invalidity is necessarily a serious illness, the Organisation says that the report form used by the Invalidity Committee was designed in cooperation with medical experts. It thus follows that medically qualified persons do not find it a contradiction that a staff member may be permanently unable to carry out duties without the reason for the incapacity being a serious illness within the meaning of Article 62(7).

CONSIDERATIONS

1. From 8 December 1993 until her separation from service in July 2002, the complainant stayed away from work on the grounds of illness. Following the expiry of the maximum amount of sick leave on full pay, her case was referred to the Invalidity Committee which made two reports dated respectively 12 September 1994 and 31 May 1995. Both reports concluded that her sick leave should be extended, but that the complainant was not suffering

from a serious illness within the meaning of Article 62(7) of the Service Regulations. As a result, she received a reduced salary pursuant to that provision.

2. Following a series of further meetings (and a long delay which neither party has seen fit to explain) the Invalidity Committee issued a final report in July 2002. It found that the complainant was suffering from total invalidity and was unable to perform her duties at the EPO.

3. Based on that report, the President of the Office decided on 22 July 2002 that the complainant's incapacity for work was not the result of a serious illness within the meaning of Article 62(7).

4. He ordered that she be separated from service on 31 July 2002 and impliedly decided that until then she should continue to receive the reduced emoluments provided for in cases of illnesses which are not "serious". That is the impugned decision.

5. Articles 62(6) and 62(7) of the Service Regulations read as follows:

"(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 3, 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 this basic salary."

6. The following are extracts of the relevant parts of the reports of the Invalidity Committee:

September 1994

"[The complainant] is unfit for work at present, but she is not considered to be permanently disabled as a result of a serious illness within the meaning of Article 62(7) [of the Service Regulations]. It is proposed that her sick leave be extended by three months, after which a follow-up examination should be made."

May 1995

"In view of her health problems, [the complainant] continues to be unfit for work and to require intensive treatment. Since, however, the chances of her being able to resume her duties in the future can be regarded as good, she is not considered to be permanently disabled as a result of a serious illness within the meaning of Article 62(7).

It is proposed that her sick leave be extended to the end of 1996. If [the complainant] is unable to resume work at the end of that period, it is suggested that a follow-up examination be made."

July 2002

"2.1 The permanent employee is suffering from total invalidity, ie for health reasons is physically or psychologically completely unable to perform [her] EPO duties at the grade assigned under Art. 3(1) [of the Service Regulations].

Reasons for the finding under point 2 above:

Given the nature of her complaints and the severe and chronic nature of her illness, the [complainant] is absolutely unfit for work now and for the foreseeable future.

2.2 The disability is not the result of an industrial accident within the meaning of Art. 14(2) [of the Pension

Scheme Regulations].

The permanent employee is not suffering from an occupational disease within the meaning of Art. 14(2).

Reasons for the finding under point 2.2 above:

In [one doctor's] view invalidity is at least in large part a consequence of suspected chemical pollution (eg pyrethroids) at the subject's former workplace."

7. There can be no doubt that both the first and second of the above cited reports make it clear that the complainant was not suffering from a "serious illness" within the meaning of Article 62(7) during the periods covered by those reports. The complainant's argument to the effect that those findings are somehow overruled by the final report cannot be accepted. If she is entitled to receive the higher payments mentioned in that provision, it can only be from the date that the Invalidity Committee determines her illness to have been serious.

8. It is, however, equally indisputable in the Tribunal's view, that the EPO is wrong to argue, as it does, that because the first two reports say that she was not then suffering from a serious illness, that situation necessarily continued until she was separated from service on an invalidity pension. The report in May 1995 had specifically predicated its finding that she was not suffering from a serious illness on the view that "the chances of her being able to resume her duties in the future can be regarded as good". Seen in that light, the final report, although it does not specifically address the question in the terms of Article 62(7) implies very clearly that, in the opinion of the doctors, the complainant's illness had, at least by then, become serious. No other construction can be put on the doctors' use of the words "the severe and chronic nature of her illness". The impugned decision was wrong in law to hold otherwise. The report is, however, incomplete in one important respect: it fails to indicate the date at which the complainant's illness became serious. That date cannot of course be any later than June 2002 when the members of the Committee examined the complainant and made their determination.

9. The Tribunal gives no weight whatever to the fact that the EPO, after the Invalidity Committee's final report had been received and acted upon by it, went back to the three members and obtained from two of them an informal statement to the effect that they did not consider that the complainant's illness was "serious" within the meaning of Article 62(7). The members of the Committee had at that point already rendered their decision and no circumstances have been shown which would entitle any or all of them to revise it. Their individual opinions expressed after the fact are of no effect save, necessarily, to disqualify them from further considering this case. The complaint does not attack the report of the Committee (which is, in any event only subject to limited judicial review) but the decision of the President which purports to interpret that report. Since that decision is for the reasons stated wrong in law, it must be set aside.

10. The complainant is entitled to be paid the whole of her "basic salary" as from the date on which a differently constituted Invalidity Committee shall determine her illness to have become serious, prior to June 2002, up to the date of her separation from service on an invalidity pension, 31 July 2002. She is also entitled to moral damages in the amount of 5,000 euros and to costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall pay to the complainant any amounts required to make up the whole of her "basic salary" from the date to be determined by a differently constituted Invalidity Committee as the start of her serious illness, up to 31 July 2002.

3. It shall also pay her moral damages in the amount of 5,000 euros and costs of 2,000 euros.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K.

Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.