NINETY-SEVENTH SESSION

Judgment No. 2358

The Administrative Tribunal,

Considering the sixth complaint filed by Mr N. F. against the European Patent Organisation (EPO) on 23 June 2003 and corrected on 4 July, the EPO's reply of 13 October, the complainant's rejoinder of 29 October 2003 and the Organisation's surrejoinder of 13 February 2004;

Considering Article II, paragraph 5, 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. Facts relevant to the present case are to be found in Judgment 2079, delivered on 30 January 2002, on the complainant's fifth case. The complainant is a former staff member of the European Patent Office – the EPO's secretariat. He had been suffering from repetitive strain injury (RSI) and this case concerns the invalidity procedure that was put in place.

As recounted in Judgment 2079, the complainant was informed on 6 April 1999 that, on 16 April 1999, he would reach the maximum period of sick leave on full pay; thereafter, he would be on extended sick leave and would receive only half of his basic salary.He was told that if subsequently it appeared that his incapacity was the result of a serious illness as defined in Article 62(7) of the Service Regulations, he would be entitled to the whole of his basic salary. The date marking the beginning of his extended sick leave was later set at 11 May 1999.

In a report signed on 6 March 2000 the majority of the Invalidity Committee found that the complainant was suffering from a "severe" illness. All three members of the Committee subsequently decided that the complainant should be examined by a rehabilitation specialist.That examination took place in August 2000. The Invalidity Committee issued another report on 14 November 2000. This time it found, still by a majority, that the complainant was not suffering from a "severe" illness.

On 20 November 2000, shortly before he filed his fifth complaint with the Tribunal, the complainant was informed that, in the light of the most recent report issued by the Invalidity Committee, the Office would continue to pay him only 50 per cent of his salary during his extended sick leave.

On 19 January 2001 the complainant sent the Tribunal what he called "further submissions" to his brief on his fifth complaint. In those submissions he contested the decision of 20 November 2000 and claimed damages. In Judgment 2079 the Tribunal dismissed his fifth complaint. Referring to the Invalidity Committee's reports signed on 6 March and 14 November 2000, it noted that the parties disagreed as to the validity and meaning of those two reports, and stated that if the complainant still had grievances regarding the proceedings before the Invalidity Committee he had to "exhaust his internal remedies by way of a valid internal appeal".

Already on 19 January 2001, the complainant had sent a copy of the "further submissions" to the President of the Office. In an accompanying letter he asked the President to waive any further internal appeal proceedings in his case, or otherwise treat the enclosed submissions as an internal appeal against the decision of 20 November 2000. The matter was referred to the Appeals Committee. In its report of 27 November 2002, the Appeals Committee found that neither the Office nor the Invalidity Committee had acted in a manner that would make them liable for damages. However, it recommended examining the particular circumstances of the case to see whether, to avoid further delay, there was justification for "assuming in the [complainant's] favour that he was suffering from a serious illness within the meaning of Article 62(7)".

By a decision of 27 March 2003 the complainant was informed that the President did not consider the arguments put forward by the Appeals Committee to be convincing and had rejected his appeal, principally on the grounds that the Office had correctly relied on the Invalidity Committee's report of November 2000. That is the impugned decision.

In August 2001 the Invalidity Committee found the complainant to be permanently unfit for work, and from 1 September 2001 he was placed on an invalidity pension.

B. The complainant considers that the Invalidity Committee's report of 6 March 2000 is binding. It provided evidence of a majority opinion to the effect that he was suffering from a serious illness, and on that basis he claims that he was entitled to his full salary from 11 May 1999 during the whole period of his extended sick leave. He notes that the Appeals Committee found it "highly implausible" that he could be found to be suffering from an illness that was deemed to be "severe" in March 2000, only for it to be qualified as a non-serious illness in November of that year. He finds the Invalidity Committee's change of mind to be questionable.

He considers that the report of November 2000 was invalid, mainly because of procedural flaws. For one thing, he contests the involvement of Dr N. at the EPO who, although she was not a member of the Invalidity Committee, sent the November report to the two external appointees in her own name; this did not correspond to normal practice since the administration of such reports is usually entrusted to a duly appointed secretary.

He remains unconvinced by the Appeals Committee's conclusions in some respects and asks the Tribunal to examine the arguments he put forward in his internal appeal.

The complainant seeks the quashing of the decision of 27 March 2003, rejecting his internal appeal; reimbursement of the 50 per cent of his salary that was withheld between 11 May 1999 and 31 August 2001, with compound interest; moral damages for negligence on the part of the Invalidity Committee and the Office during the invalidity proceedings; "aggravated damages" for the "cursory" manner in which the President dismissed his appeal, since he supplied no reasoned statement; and costs.

C. The Organisation submits that the position put forward by the complainant lacks foundation and that there are no grounds for awarding damages. Based on the chronology of events, the Office was justified in concluding that the report signed on 6 March 2000 was only provisional, because steps were being taken to have him examined by another specialist; the Committee clearly needed more information before making a reasoned assessment of the complainant's illness. The Office therefore considered that it was the finding in the report of November 2000 that had to be implemented. For these reasons, the Organisation holds that the decision of 20 November is not open to criticism, and there are no grounds for paying the complainant the other 50 per cent of his salary. Relying on Judgment 2145, it argues that the Office was bound by the findings of the Invalidity Committee until such point as the Committee made any further finding, be it to extend his sick leave or put an end to it. The EPO contends that by suggesting the complainant's illness should be defined as a serious one, the Appeals Committee went beyond its competence. The issue being a medical one, the Invalidity Committee alone is competent to determine the matter.

It explains the reason for Dr N.'s involvement in the invalidity procedure. She assisted Dr P., the President's appointee on the Invalidity Committee, with the administrative handling of pending procedures, but the medical assessment of the complainant's case was done by Dr P.

Furthermore, it considers that the President of the Office acted in line with the Tribunal's case law. He clearly stated the main reason for dismissing the complainant's appeal and also indicated that his appeal was being rejected for the reasons put forward by the Office during the appeal proceedings.

D. In his rejoinder the complainant expands on his pleas. If, as argued by the Organisation, both of the invalidity reports were valid, he is entitled to the other 50 per cent of his salary during his extended sick leave at least up to November 2000, when his illness was not considered to be serious. He therefore puts forward an alternative claim for payment "of the 50% salary withheld between 11.5.99 and November 2000" with compound interest.

E. In its surrejoinder the Organisation reiterates that the report of March 2000 was only provisional and the report to be implemented was that of November 2000. It points out that if at the latter date he had been found to be suffering from a serious illness, he would have received the other 50 per cent of his salary retroactively. It also contests the complainant's claims to legal costs.

CONSIDERATIONS

1. Owing to an illness, diagnosed as repetitive strain injury (RSI), the complainant had been fully or partly unfit for work since June 1997. He ceased to perform his duties at the EPO with effect from 1 September 2001, under the terms of Article 54(2) of the EPO's Service Regulations. From this latter date, he was admitted to the benefit of an invalidity pension owing to his illness.

2. In view of the fact that the complainant was to reach the statutory limit for sick leave on full pay as set out in Article 62(6) of the Service Regulations, and that he would therefore pursuant to Article 62(7) receive only half his basic salary, plus full allowances, once this limit was reached, proceedings before the Invalidity Committee had been initiated on 16 April 1999.

3. For the proceedings before the Invalidity Committee, the President of the Office and the complainant each appointed a doctor of their own choosing and the two doctors together appointed a third member of the Committee, Dr S.

4. In its report of 6 March 2000, a majority of the Invalidity Committee concluded that the complainant:

"[…] is suffering from a severe illness / disability comparable in severity to cancer, tuberculosis, heart disease, poliomyelitis, or neurological or mental illness".

His sick leave was extended to February 2001. The member of the Committee appointed by the President did not sign the report.

5. On 19 April 2000 the Office received a letter dated 4 April 2000 from the Committee, signed by all three doctors, in which they indicated that they considered an additional medical examination by a rehabilitation specialist to be necessary. The Office informed the complainant's appointee on 4 May that it was assuming that the Committee's final report was "still outstanding", since the Committee had unanimously expressed the wish that the complainant undergo a further medical examination. In a letter dated 9 May, the President's appointee confirmed that the report of 6 March was not the Committee's final report but merely an element of the internal decision-making process.

6. After the additional examination had taken place, the Invalidity Committee issued a further report signed on 14 November 2000 which is at the heart of the present proceedings. The body of the report, assented to by the President's appointee and Dr S., with a dissent by the complainant's appointee, states in the relevant part of the printed form that the complainant:

"[...] is not suffering from a severe illness / disability comparable in severity to cancer, tuberculosis, heart disease, poliomyelitis, or neurological or mental illness."

7. The printed form, used by the Committee for its report, is presumably intended to give effect to Article 62(7) which reads:

"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."

8. In a letter which he appended to the Invalidity Committee's report signed on 14 November 2000, Dr S. explained why he had changed his opinion as to the character of the complainant's illness since the March report:

"[…] I consider that the concept of a severe illness is badly defined in the [printed] form. As a pathological condition, repetitive strain injury is not comparable with cancer, tuberculosis, heart disease, poliomyelitis or neurological or mental illness.

On the other hand, there is no doubt that RSI leads to serious disability, so that in this respect the consequences of [RSI] are comparable in severity with the conditions described. Moreover, the illnesses described are formulated in such broad terms that they include diseases from which recovery is possible, ones with a fatal outcome, and others in which the situation remains stable. Now RSI does not have a fatal outcome, so that a patient with RSI will either improve or else his or her condition will remain stable.

I therefore conclude that there are more arguments to support the notion that, in terms of the definition, the patient is not suffering from a severe illness, as stated in my letter of 1999. However, the patient does have a severe disability. All in all, I consider that the definition of [point 1.8 in the form] is far too unclear, for its consequences can indeed be substantial."

9. In a communication dated 20 November 2000, the Office informed the complainant that in the light of the Invalidity Committee's report, he would continue to be paid 50 per cent of his salary during his extended sick leave. On 19 January 2001 the complainant contested this decision and lodged an internal appeal, which was referred to the Appeals Committee.

10. The Appeals Committee did not find it necessary to decide whether the first report – signed on 6 March 2000 – was binding or whether it was merely an intermediary document in the opinion forming process. Instead, it underlined that the importance of this document lay in the fact that it provided evidence of a majority opinion to the effect that the complainant was suffering from a serious illness. The Appeals Committee found that the change of mind in the report of 14 November 2000, in which it was found that the complainant's illness was not serious, was not justified by any explanation by the physicians as to why the findings of the first report should be overturned. The conclusion of the November 2000 report was found all the more implausible in the light of the fact that in August 2001, the Invalidity Committee diagnosed permanent disability in the following terms: "[The complainant] is suffering from a severe form of RSI". The Appeals Committee was of the opinion that there were no apparent reasons for assuming that the complainant's condition in the relevant period – May 1999 to August 2001 – did not warrant the name of serious illness. It recommended that the President consider it as such. It also recommended rejecting the claim for the award of damages because it found that neither the Office nor the Invalidity Committee had acted in a manner that made them liable for damages.

11. By a letter dated 27 March 2003, the complainant was informed that the President had decided not to endorse the opinion of the Appeals Committee on the grounds that:

"[...] he did not find the arguments of the Committee convincing, the main reason being that the Office correctly relied on the report of the Invalidity Committee dated 14 November 2000 concerning the type of illness. On this basis, and for the other reasons put forward by the Office during the proceedings, he has decided to reject the appeal."

That is the impugned decision.

12. The complainant fully agrees – except in two respects – with the opinion of the Appeals Committee and he presses the views expressed therein. The two points on which he disagrees with the Appeals Committee concern the "procedural propriety of the invalidity report of November 2000" and the validity of the Invalidity Committee's previous report of March 2000.

13. The complainant believes he was suffering from a serious illness and that the Invalidity Committee's report of November 2000 was invalid because of procedural flaws, more particularly in that there was participation of a third person in the process, namely an assistant to the President's appointee on the Committee. He requests, inter alia, to be paid the outstanding 50 per cent of his salary and claims moral damages on grounds of negligence by the Invalidity Committee and the Office. Lastly, the complainant claims the award of "aggravated damages" for the "cursory" manner in which the President dismissed the appeal.

14. While the Tribunal entertains considerable doubt as to the adequacy of the reasons given by the President in support of the impugned decision, which are far from giving an understandable explanation for his refusal to follow the recommendations of the Appeals Committee (although those recommendations are far from being clear and conclusive), there are also strong substantive reasons for allowing the complaint. Since the question is an important one which has reappeared in a number of recent cases, the Tribunal prefers to deal with the matter on its merits.

15. There is in this case a manifest inconsistency and incoherence in the manner in which the EPO interprets and applies Article 62(7) of its Service Regulations. The said article appears to look only to the nature of the disease itself rather than to the nature of the resulting disability, stating:

"[...] where the incapacity [...] is the result of [...] a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease [...]".

16. The printed form provided by the EPO for the guidance of the members of the Invalidity Committee has a different emphasis altogether. It speaks not only of the seriousness of the cause (the illness) but also of the severity of the result (the disability) and places the two on the same footing:

"The permanent employee is suffering from a severe illness / disability comparable in severity to cancer, tuberculosis, heart disease, poliomyelitis, or neurological or mental illness".

17. Faced with this ambiguity, the third member of the Invalidity Committee, Dr S. – whose changed vote changed the result – was forced to try to interpret a legal text, a task for which he was not qualified. As his letter annexed to the November 2000 report makes clear, he concluded that he should give more weight to the cause (the pathological condition) apparently because some, but not all, of the five or (in the form) six listed illnesses could have fatal outcomes whereas RSI could not. The validity of the use of this medical distinction as a basis for interpreting text which he described as "badly defined" and "unclear" is not sound in law. It is also considerably weakened by the doctor's further observation that some, but again not all, of the listed diseases could result in either a stable or an improved condition and that RSI causes a serious disability comparable in severity to those listed. His medical conclusion that the complainant has a "severe disability" is itself unambiguous.

18. The Tribunal can only echo the doctor's view that in medical terms the texts are ambiguous. This ambiguity results, however, from the EPO's own texts and, in those circumstances, the Tribunal asserts categorically that, as a matter of law, the ambiguities must be resolved in the manner most favourable to staff members. That is simply an application of the general rule requiring that any ambiguous text should be construed against the interest of the person responsible for drafting it and in favour of the person upon whom it is imposed. (For a recent application of the rule, see Judgment 2290.) It was Dr S.'s failure to follow this rule of law that led him and the majority of the Invalidity Committee to find as they did.

19. The Tribunal also notes that the interpretation in the printed form appears to be more in harmony with the presumed purpose of the rule, namely to allow staff to benefit when, through no fault of their own, they become totally, but not necessarily permanently, disabled. Given the ambiguity in Article 62(7) of the Service Regulations, that provision should be interpreted so that the cause of disability, be it accident or sickness, is of less significance than its gravity.

20. The Appeals Committee found the November 2000 report of the Invalidity Committee not to have been "internally consistent and plausibly reasoned". In its view, the matter would have to be referred back to the Invalidity Committee for a further opinion. In the Tribunal's view, that is not necessary. Once the legal error in Dr S.'s opinion is corrected, it becomes clear that in his medical opinion he considered the complainant's condition, that is his disability, to be comparable in severity to what would result from cancer and the other listed illnesses. Had he been aware of the proper interpretation of the relevant text, he would undoubtedly have confirmed the opinion which he had previously expressed in the Committee's earlier report of March 2000. The complainant is entitled to be paid the balance of his full salary from May 1999 up to the date of his admission to permanent invalidity, on 31 August 2001.

21. Given the conclusion at which it has arrived, the Tribunal need not consider the complainant's further arguments relating to alleged procedural defects in the Invalidity Committee's proceedings, which are in any event of little or no substance. It is likewise with his claim for damages. He is, however, entitled to his costs in an amount of 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall pay the complainant the arrears to make up his full salary for the period from May 1999 to 31 August 2001 (together with interest at 8 per cent per annum from each payment due date).

3. It shall also pay him costs in the amount of 1,500 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.